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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TCI CABLEVISION, INC., COMMUNITY TELE-COMMUNICATIONS, INC., and TELE-COMMUNICATIONS, INC.,
Petitioners,

–against–

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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January 14, 1987

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 85-1805

CENTRAL TELECOMMUNICATIONS, INC.,

Appellee,

v.

TCI CABLEVISION, INC.,
COMMUNITY TELECOMMUNICATIONS, INC.,
AND TELECOMMUNICATIONS, INC.,

Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 10, 1986
Filed: August 26, 1986

Before HEANEY and FAGG, Circuit Judges, and WOODS,* District Judge.

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* The Honorable HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

HEANEY, Circuit Judge.

This antitrust-monopolization case arises out of competition between TCI, Cablevision, Inc. (and two related corporations, collectively TCI) and Central Telecommunications, Inc. (Central), for a defacto[1] exclusive cable television franchise in Jefferson City, Missouri (the City).

I. FACTS.

TCI managed the City's cable television system for the Athena Cablevision Corporation from 1973 to 1978. In 1978, it acquired the assets of Athena in the City and was then awarded a three-year exclusive cable television franchise. Three months before TCI's franchise was scheduled to expire, the City initiated a "Request for Proposals" (RFP), or bidding process, to solicit bids to determine the recipient of the next franchise.

Two companies—Central and Teltran—submitted bids for the franchise.[2] TCI refused to participate, arguing that it had a first amendment right to continue to provide cable television services in the City, and that the City thus had no right to award an exclusive franchise to another company. The City contended that its cable television market was a "natural monopoly" and that it could not create competition for its cable TV market without offering an exclusive franchise.

TCI then began a campaign, accompanied by numerous unethical and illegal acts, to coerce the City to grant it the exclusive franchise. Nonetheless, after a preliminary vote in January of 1982 in favor of Central, the City Council voted in April, 1982, to grant the exclusive franchise to Central. Central was obligated under this franchise to provide substantially expanded services to subscribers at a cost less than they had

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[1] Although the franchises at issue in this case were nominally termed "nonexclusive", they were, in practical operation, exclusive. Accordingly, we generally term the de facto exclusive franchises simply "exclusive."

[2] TCI ultimately also submitted an application, but the City determined that the application could not be considered because it failed to comply with the RFP.

been paying. The mayor immediately vetoed this ordinance and the City Council was unable to override it. An ordinance was promptly submitted which proposed renewal of TCI's franchise. The Council deadlocked at a five-to-five vote and the mayor then cast the tie-breaking vote in favor of TCI. The TCI proposal provided fewer viewing channels and inferior picture quality at a higher monthly rate than did the Central proposal.

Central then brought this action against TCI, alleging that TCI had unlawfully interfered with the RFP process to deny Central the franchise and to retain an exclusive franchise for itself. After thirty-one days of trial, the court granted Central's motion for a directed verdict on TCI's counterclaims, and submitted the case to a jury on three theories: 1) that TCI had unlawfully conspired with the mayor and other City officials to retain its exclusive franchise in violation of Section One of the Sherman Antitrust Act; 2) that TCI had undertaken illegal anti-competitive actions to retain its monopoly of the Jefferson City cable TV market in violation of Section Two of the Sherman Antitrust Act; and 3) that TCI had tortiously interfered with Central's business expectancy in violation of the laws of the State of Missouri. The jury ruled in favor of Central on all three claims and awarded $10,800,000 in actual damages on its antitrust and state law claims and $25,000,000 in punitive damages on the state law claim. The court trebled the $10,800,000 award, and entered judgment for $32,400,000 on the antitrust claims and, in the alternative, $35,800,000 on the state law claim. TCI appeals, raising seven issues, each of which we deal with in turn.

II. DISCUSSION.

A. First Amendment Challenge to Exclusive Franchising Scheme.

TCI's first contention is that it has a first amendment right to remain in the City's cable television market with or without a franchise from the City, and that, therefore, Central could not have been damaged when it lost the exclusive franchise. We

reject this argument. Before reaching the merits of this argument, we note that there is a significant factual problem with it. The district court found:

> Defendants enjoyed every opportunity to produce evidence and make arguments to persuade the jury that they were at all times in favor of head-to-head competition in the market place. * * * [However] the jury [was not] swayed by any of these arguments [and] factual findings implicit in [its] verdict confirm that TCI's endorsement of head-to-head competition lacked sincerity. * * * There was substantial evidence that defendants were engaged in a calculated scheme to prevent plaintiff from entering the Jefferson City market and to maintain a *de facto* exclusive franchise for themselves. * * * The jury's conclusion that defendants * * * were responsible for plaintiff's exclusion from the Jefferson City market * * * completely undermines any attempt to pass the blame on to the city by way of an amorphous "First Amendment defense."

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891, 903 (W.D. Mo. 1985).

Because we find substantial evidence in the over 7,000-page record in support of this conclusion by trial judge and jury, we think that TCI's first amendment defense fails on its facts because it did not seek to simply remain in the market but to continue its monopoly.[3]

Assuming arguendo that TCI was willing to compete head-to-head with any competitor, we find TCI's first amendment defense to be without legal merit. The district court held:

> [T]he grant of a single cable franchise is permissible only if the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation. The theory is that, where physical and economic factors render

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[3] Under the Supreme Court's decision in *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945), a member of the communications industry who conspires or engages in predatory conduct for the purpose of eliminating its competitors is fully liable under the antitrust laws.

> a market incapable of accommodating more than one cable television system, the local governing body is in the best position to determine which proposed system offers the best service to the public for the lowest cost. Since only one competitor can survive in the market, it makes sense to allow the local government to choose the best[4] applicant.

Central Telecommunications, 610 F. Supp. at 899-900 (footnotes omitted), *citing Tele-Communications of Key West, Inc. v. United States,* 757 F.2d 1330, 1338 (D.C. Cir. 1985); *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 127 (7th Cir. 1982); and *Community Communications, Inc. v. City of Boulder,* 660 F.2d 1370, 1378-80 (10th Cir. 1981), *cert. dismissed,* 456 U.S. 1001 (1982).

The Supreme Court has not directly addressed this issue. In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974), it rejected an argument that the natural monopoly characteristics of the newspaper market gave rise to a duty to provide public access to the press. However, it has approved "far more intrusive regulation of broadcasters than of other media [such as newspapers] * * * because of the inescapable physical limitations on the number of voices than can simultaneously be carried over the electromagnetic spectrum." *Quincy Cable T.V., Inc. v. F.C.C.,* 768 F.2d 1434, 1448 (D.C. Cir. 1985), *citing, e.g., F.C.C. v. League of Women Voters of California,* 468 U.S. 364, 82 L.Ed.2d 278 (1984). Thus, the question is whether cable television should be analyzed under the standards applicable to newspapers or those applicable to broadcasters.

TCI contends that cable television is entitled to "coextensive protection" with the press media. In its recent decision in *Los Angeles v. Preferred Communications, Inc.,* _____ U.S. _____, 106 S. Ct. 2034 (1986), the Court suggested that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the cable medium may be permissible because cable requires use of

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[4] We note that there is no question here of content regulation in determining who would be the "best" applicant.

public ways and installation of cable systems may disrupt public order. There, a cable television company sued the City of Los Angeles and its cable franchising department, alleging that the City violated its first amendment rights by refusing to grant it a cable television franchise or to allow it access to cable facilities on the ground that it had failed to participate in an auction for a de facto exclusive franchise in the area. The district court dismissed the complaint for failure to state a claim. The United States Court of Appeals for the Ninth Circuit then reversed and remanded for further findings on whether the City's exclusive franchising scheme violated the first amendment where there was economic and physical capacity for more than one franchise. It stressed that the City's only defense was that allowing more than one cable operator would overly burden and disrupt public property and order. The Supreme Court affirmed, "on a narrower ground than the one taken by [the Ninth Circuit]," 106 S. Ct. at 2036, and refused, without development of a more detailed factual record, to set forth the legal standard for assessing first amendment challenges to cable-franchising schemes. The Court simply held that, given that the Los Angeles cable market was not a natural monopoly and that the only alleged justification for limiting the number of cable operators in the Los Angeles area entailed the use and disruption of public property and order, a remand was necessary for determination of whether the petitioner's first amendment rights outweighed the disruption alleged by the City. Justice Blackmun, with whom Justices Marshall and O'Conner joined, concurring, emphasized:

> I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e.g., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974), with *FCC v. League of Women Voters,* 468 U.S.

> 364, 381, 104 S. Ct. 3106, 3118, 82 L.Ed.2d 278 (1984). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante,* at 5, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

106 S. Ct. at 2038-39.

The Tenth and Seventh Circuits have held that, on the facts before them, cable television is more analogous to broadcasting than to newspapers, and that a "natural monopoly" situation may justify an exclusive franchising scheme. In *Community Communications v. City of Boulder,* 660 F.2d 1370 (10th Cir. 1981), Community Communications Corporation (CCC) had been operating an exclusive cable television system in certain neighborhoods of Boulder, Colorado, for many years. After several other companies expressed interest in operating cable TV franchises in other areas of the City, the City imposed a moratorium on CCC's expansion in order to provide other companies the opportunity to make bids to service the remaining parts of Boulder before CCC became so entrenched that new entry would be impracticable. CCC alleged that the moratorium violated the first amendment. The City contended that cable television is a natural monopoly and that if it was unable to grant de facto exclusive franchises for various neighborhoods, CCC would remain the only cable television operation in Boulder and its citizens would be denied access to diversity and state-of-the-art programing. The Court of Appeals reversed the district court's order enjoining the City from enforcing the ordinance, and ordered that all parties be frozen in their current circumstances until trial on the merits. The Court applied a balancing analysis, weighing the first amendment concerns against the asserted justifications for the ex-

clusive franchise scheme and held that "natural monopoly is a constitutionally permissible justification for some degree of regulation of cable operators." 660 F.2d at 1379. The Court emphasized that the extent of regulation permissible is narrowly limited by, among other possible factors,

> differences in (1) the degree of natural monopoly or "scarcity" characterizing the medium, (2) the pace and potential for technological change, or (3) the uses and possible uses of the medium such as two-way cable communications or even interconnection, [which] might make kinds of regulations constitutionally permissible in one medium that would be forbidden in another. But we caution: the power to regulate is not one whit broader than the need that evokes it. [Footnote omitted.]

Id.

The next year, the United States Court of Appeals for the Seventh Circuit also found that where a relevant cable television market is a natural monopoly, an exclusive franchise may be permissible consistent with the first amendment. In *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), the City of Indianapolis awarded two de facto exclusive cable television franchises for certain sections of the City. A third cable operator also serviced certain apartment complexes in the City. Because it operated simply by installing satellite dishes at the complexes, and thus did not use any public way, it was not subject to the City's franchising ordinance. This company then sought a franchise so it could interconnect apartment complexes without the need to install new satellite dishes at each complex. After the City failed to act on its application, the company connected two complexes with a cable through a drainage culvert. The City ordered the company to remove the cable and the company refused and sought an injunction, on Sherman Act and first amendment grounds, forbidding the City from removing the cable or enforcing its franchising scheme. The district court denied the request for an injunction and the Court of Appeals affirmed, holding that on the first amendment challenge, "If Chapter

8-1/2 is invalid under the First Amendment (a question we emphatically do not decide) it is so because it lacks adequate standards and procedures, not because a city may not limit the entry of cable television companies." *Id.* at 129. It distinguished cable television from newspapers on the ground cable requires use of public ways and because television enjoys "universal access to the home * * * and [there is] a resulting felt need to protect children." *Id.* at 127-28. Accordingly, it stated that although natural monopoly is not a justification for exclusive franchising for newspapers, "The apparent natural monopoly characteristics of cable television provide * * * an argument for regulation of entry." *Id.* at 127-28. *See also Tele-Communications of Key West v. United States,* 757 F.2d 1330 (D.C. Cir. 1985) (Holding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's exclusive franchising scheme would violate the first amendment.) *But cf. Preferred Communications v. City of Los Angeles,* 754 F.2d 1396, 1404-05 (9th Cir. 1985), *aff'd and remanded on other grounds,* ___U.S.___, 106 S. Ct. 2034 (1986) (Although the Court did not reach the argument that natural monopoly justifies government regulation of cable television because it assumed that competition for cable services is economically feasible in the Los Angeles area, it implied that "natural monopoly" is not a justification for exclusive franchising.)

We recognize that there are profound first amendment implications inherent in the regulation of cable operators. Changes in technology such as were presented in the *Omega* case may require a different approach to exclusive franchising schemes. We are also aware of the difficulties inherent in the regulation of cable television programming. *See, e.g., Quincy Cable TV, Inc. v. F.C.C.,* 768 F.2d 1434 (invalidating F.C.C.'s "must carry" cable television regulations on first amendment grounds). *Cf. F.C.C. v. Midwest Video Corp.,* 440 U.S. 689, 59 L.Ed.2d 691 (1979) (invalidating as beyond F.C.C.'s jurisdiction rules requiring cable operators to make channels available for local access). Thus, we make clear, as did the Supreme Court in *Preferred Communications,* that we are

unwilling to decide any question which is not squarely before us and on which there has not been a full development of the record. We are not faced here with a challenge to the details of Jefferson City's franchise regulations,[5] and we, of course, consider the "natural monopoly" question only in terms of the competing technologies offered by TCI and Central. TCI's brief states the first amendment issue to be: "Did plaintiff, which was seeking an exclusive cable television franchise that would deny others equal access to speak through the cable medium, have a protectable interest under federal antitrust or state tort law when it was not awarded the exclusive franchise?"

We hold that Central did have a protectable interest because it proved, to the satisfaction of the jury and the trial judge, that the "natural monopoly" characteristics of the Jefferson City cable market justified the City in offering a de facto exclusive franchise in order to create competition for its cable television market. There is substantial support in the record for these factual findings.[6] TCI gained its monopoly through an

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[5] Inherent in the City's authority to choose the "best" cable operator for the City is the issue of how the City may reach this conclusion. In this connection, we note that the RFP terms are directed toward providing the widest array of programing at the lowest cost, and do not seek to prohibit the communication of any message. Thus, the RFP deals primarily with rates, quality and geographic breadth of service and states:

> The City is establishing few requirements as it desires that all applicants have maximum freedom to develop their own innovative proposals. * * * The City is interested in receiving proposals for a system with the capacity of delivering at least 50 channels to subscribers and with * * * technical standards which exceed current FCC requirements. * * * The City is not interested in proposed capacity which will not be used or which will necessitate unreasonably high subscriber rates. The City is interested in a flexible system which can best accommodate the present and future needs of institutional users without unduly burdening the average subscriber.

[6] *See, e.g.*, plaintiff's exhibit (PX) 400 (Touche Ross study); 19 T. 86 (Testimony of John Clair Smith, summarizing Touche Ross study: "The basic conclusion is that * * * a direct house-to-house competition between two cable companies would not be financially feasible in Jefferson City, that the market would not support sustained house-to-house competition.")

earlier grant of a de facto exclusive franchise. Unless the City opened up competition *for* the market, TCI would have remained entrenched in its monopoly position. TCI refused to provide other than an outmoded limited channel system whereas Central proposed a state-of-the-art system with far more channels at a lower cost, and, accordingly, more variety of programming for the public. It is difficult for us to see how, on this record, TCI's position enhances first amendment values. It is true that TCI has a first amendment interest in remaining as a cable television "speaker," but Central has a similar interest. Because the evidence shows that given the technology offered by the competing companies, there was economic capacity for only one speaker, it seems clear that Central's proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable.

In sum, we reject TCI's first amendment challenge for two reasons. First, the evidence reveals that TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly originally gained through the grant of a de facto exclusive franchise. Second, the evidence reveals that the City's cable television market is currently a natural monopoly which, under present technology, offers room for only one operator at a time. Thus, we hold that the City could properly offer a de facto exclusive franchise in order to create competition for its cable television market.

B. Noerr-Pennington Defense.

TCI contends that all but two of its allegedly anticompetitive actions, the threats of its corporate vice president to the City's consultant and a similar threat to a competitor, are protected activity within the purview of the *Noerr-Pennington* doctrine. This doctrine, derived from the cases of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), exempts from anti-

trust liability[7] activities which are specifically designed to procure favorable governmental action, even when the underlying motivation and effect of the activities is anti-competitive. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, § 46.04 (1982).

In early 1980, the City considered holding out its cable franchise to competitive bidding. Shortly thereafter, TCI met with the mayor and attempted to persuade him to renew its franchise without a competitive bid process, so as to avoid a "frontal attack" by competitors. In December, 1980, the City issued its RFP, inviting any company, including TCI, to bid. Thereafter, the City hired Elmer Smalling as a cable television consultant to evaluate the various bids. TCI, upon learning that the City had hired Smalling, publicly attacked his qualifications in a defamatory manner.

On several occasions, from January of 1981 to the summer of 1981, Paul Alden, TCI's vice president and national director of franchising, telephoned Robert Brooks, chief operating officer of Teltran, a company which submitted a bid for the City's franchise, and threatened him that unless Teltran withdrew from the bidding process, TCI would make trouble for Teltran in Columbia, Missouri, where it operated a cable television franchise. Teltran subsequently dropped out of the bidding process on the ground there was a "distasteful environment" in Jefferson City.

In February, 1981, Alden and Harold Farrow, TCI's attorney, met with City officials and attempted to pressure them

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[7] The district court stated that "[a]lthough the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which seek[ ] to assign liability on the basis of the defendant's exercise of its first amendment rights." *Central Telecommunications*, 610 F. Supp. at 896 n.7. Although the United States Supreme Court has not directly confronted this issue, this Court has indicated that it agrees with the principle stated. *See, e.g., In Re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1312 (8th Cir. 1985). We reiterate our agreement with this position—which is not challenged on appeal—at least with respect to the tortious interference claim at issue.

to abandon the RFP process and negotiate exclusively with TCI. In March of 1981, Alden called the mayor and threatened to turn the system off unless TCI's franchise was renewed. That same month, TCI filed a lawsuit against the City challenging the RFP process. During the litigation, TCI served on officials of the bank from which Central sought financing a subpoena seeking a very wide range of potentially confidential records. Central alleges that this was designed to destroy its financing.

In June of 1981, Alden approached Smalling and expressed TCI's displeasure with Smalling's participation in the RFP process. Alden threatened Smalling with statements like: "We know where you live, where your office is and who you owe money to. We are having your house watched and we are going to use this information to destroy you. You made a big mistake messing with T.C.I. We are the largest cable company around[.] We are going to see that you are ruined professionally." PX 83. Smalling understood these statements to be a threat to the lives of himself and his family. At this same time, Warner-Amex (another large cable company) was a client of Smalling's. Alden contacted Warner-Amex about Smalling. Following the threats, Smalling lost Warner-Amex as a client. Smalling told City Attorneys Christopher Graham and Thomas Utterback about Alden's threats. PX 83. On July 6, 1981, Utterback wrote the mayor and suggested that the RFP process be abandoned because some of the parties were interfering with the competitive bid process. PX 84. Utterback also expressed these concerns in a memorandum to the City Council in which he described TCI as a "relentless corporate bully." DX 17, T. 128.

In the fall of 1981, TCI met with Utterback and agreed to negotiate privately for renewal of its franchise, although this secret agreement and the subsequent private negotiations violated the RFP, which specified that all negotiations would be open,[8] as well as Missouri's "sunshine law." Mo. Rev. Stat. §§ 610.010-.030. After the City Council voted on January 25, 1982, to provisionally grant the franchise to Central, TCI

[8] The RFP provides that "to insure that all negotiations will be open, no applicant shall contact any City Councilman or the Mayor outside the Council Chambers." PX 84A at 20(a).

refused to pay and withheld the prior year's franchise fees which were due and owing to the City in an amount exceeding $60,000. It had no basis for this withholding other than an attempt to subvert the RFP process.

Throughout this period, TCI continued to publicly announce that it would cut off service if it was not awarded the franchise, and it announced that it would not sell "one bolt" of its system to whoever received the new franchise and that it would "rather have [its system] rot on the pole" than sell it to a competitor at any cost. Further, TCI's system manager in Jefferson City told elderly residents of a senior citizens' home that TCI would cut off service if denied a franchise, and the residents would be without television for two years pending construction of a new system because the concrete walls of their residence would not allow reception of over-the-air stations.

Additionally, TCI accompanied its franchise battle with misstatements of fact. For example, in one City Council meeting, Alden misrepresented to the Council that TCI was the largest distributor of satellite dishes in the country, with an "exclusive" in Missouri, both "facts" he later admitted were untrue. TCI implied that only it could protect the City's cable system from destructive competition from satellite dishes. The district court also stated that an implication of this statement was that TCI would flood the City with satellite dishes unless it received the franchise. 610 F. Supp. at 895.

By April 5, 1982, the City reached an agreement to award the franchise to Central. At that point, the mayor, who had recused himself from the cable television issue for over a year due to an alleged conflict of interest, announced that he was reentering the cable television controversy, and he privately advised council members that he would veto any ordinance awarding a cable television franchise to Central. TCI and certain City officials, including the mayor, then met privately to negotiate a franchise for TCI. As part of the agreement, the mayor agreed to veto any award of a franchise to Central.

On April 20, 1982, the City Council passed the ordinance awarding a franchise to Central. The vote was six in favor and four against. The mayor vetoed the ordinance. The council then deadlocked five-to-five on awarding a franchise to TCI

and the mayor cast the deciding vote in favor of that company.[9] The next day, TCI dismissed its lawsuit against the City and paid the withheld franchise fees.

TCI's initial argument is that even though its agent, Alden, may have made coercive threats to Smalling and Teltran, which are not protected under *Noerr-Pennington*, these threats did no harm to Central and thus cannot serve as a basis for imposing liability. We disagree. The jury was given a proximate cause instruction and informed that they could only base liability on

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[9] The differences between Central's and TCI's proposals are outlined in PX 285. The Central proposal was superior in numerous respects. A few of the more significant advantages are summarized in the following chart:

COMPARISON OF CENTRAL TELECOMMUNICATIONS, INC., PROPOSAL WITH REQUIREMENTS OF FRANCHISE ORDINANCES NO. 9777 AND NO. 9778

[Awarding franchise to TCI]

Item	Central Telecommunications, Inc. Proposal	Ordinance No. 9777 & No. 9778
Addressable Converters	Provided to All Subscribers	Provided only to Subscribers Taking Expanded Service
Equipment for Interactive Services	Head end Equipment Installed	None
System Design	Single Residential Cable (42 Channels Downstream Capacity, 4 Channels Upstream Capacity)	Present System Expanded From 12 Channels to 21 Channels Downstream Capacity Within 12 months
	Single Institutional Network Cable	No Institutional Cable
	2 Satellite Earth Stations	1 Satellite Earth Station
Services and Programming	Imported TV Stations—13	Imported TV Stations—11
	Pay TV Services—4	Pay TV Services—2
	FM Radio Service—23 Stations	FM Radio Service—"in Excess of" 15 Stations
Initial Rates	Basic TV Service:	Basic TV Service:
	Tier I (21 Channels)—$6.00/Month	Tier I (12 Channels)—$6.55/Month
	Tier II (38 Channels)—$8.00/Month	Tier II (21 Channels)—$8.55/Month
	Pay TV Service:	Pay TV Service:
	Home Box Office $7.95/Month	Home Box Office $9.95/Month
	Showtime $8.45/Month	Showtime $9.95/Month
	Cinemax $9.95/Month	—
	Movie Channel $7.95/Month	—

acts which were not genuine efforts to influence City officials. Giving Central the benefit of all reasonable inferences to be drawn from the record, the jury may have concluded that TCI's heavy-handed tactics frightened the mayor and some members of the City Council into awarding the franchise to TCI.

Additionally, TCI contends that even if Alden's threats harmed Central, the verdict must be set aside because we have no way of knowing whether the jury relied on these threats or on protected conduct in assessing liability against it. We reject this argument for several reasons:

First, the parties agreed to submit the case to the jury on a general verdict instruction and form, and there is evidence on the record as a whole to support the verdict. *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147, 150 (8th Cir. 1982); *Bio-Rad Laboratories, Inc. v. Nicolet Instrument Corp.*, 739 F.2d 604, 607 (Fed. Cir. 1984), *cert. denied,* 105 S. Ct. 516 (1985) ("In the absence of special interrogatories we presume the existence of factual findings and legal conclusions necessary to support the verdict reached by the jury.").

Second, TCI was under no obligation to continue to provide service to the residents of Jefferson City after its franchise expired, and it certainly had the right to inform City officials, its customers and the public at large of its intent not to do so. Likewise, TCI was under no obligation, except as required by the franchise agreement, to sell its cable television system to its successor, and it had a clear right to inform City officials, its customers and the public at large that it would not do so. *Cf. United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971), *aff'd,* 410 U.S. 366, 368 (1973); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd on other grounds,* —— U.S. ——, 105 S. Ct. 2847 (1985); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978).

Had TCI made a simple clear request that the jury be so instructed, it would have been error to refuse the request. But it appears from the record as a whole that TCI was not satisfied with this approach. It rather wanted and requested a broader instruction that would have immunized other conduct which the

jury could well have found unlawful.[10] The district court refused to give TCI's overly broad, long and confusing *Noerr-Pennington* instructions, preferring more concise and understandable instructions and allowing TCI to argue at length before the jury that all of its activities were genuine lobbying

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[10] TCI proposed the following *Noerr-Pennington* instructions:

NOERR-PENNINGTON—GENERAL

The Constitution ensures the right of all persons and corporations, whether acting individually or in concert, to petition government for political action, recognizing that persons in the exercise of these constitutional rights naturally will petition government for political action that is favorable to their particular interests and unfavorable to the interests of others. The Supreme Court has declared that this right to petition government for political action is paramount, and that the concerted effort of various parties genuinely to influence public officials does not in any way violate the law regardless of intent or purpose. Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws even though the efforts are intended to eliminate competition.

Similarly, the Constitution protects a person's right of access to the courts for resolution of disputed issues. The antitrust laws are not violated when a person files a suit, even if he hopes and intends that the judge or jury will enter verdicts which will injure his competitors.

In short, activity which is intended to influence or cause official governmental action—whether by an individual such as a mayor, by a legislative body such as a City Council, or by judges and juries—does not violate the law, regardless of the intentions of the persons engaging in such activity.

NOERR-PENNINGTON—APPLICATION TO THIS CASE

To the extent that you find that defendants engaged in legitimate efforts to influence governmental action or to seek redress for its grievances through the courts, you are directed that you cannot find the defendants liable for any of the claims asserted by plaintiff based upon such activity. For example, if you were to find that all of defendants' actions about which plaintiff complains fit into this category of legitimate attempts to influence official action or to vindicate rights through the courts, then you could not find defendants liable for any of the offenses charged. That is, if you should conclude from a review of the evidence that defendants did nothing more in this case than take actions for the purpose of persuading the City to award them a cable television franchise on some basis, then you may not find that defendants committed any of the offenses charged, even if you believe that the purpose or necessary effect of such actions was to exclude plaintiff from obtaining a franchise. On the other hand, if you were able to find that none of defendants' actions fit into that category, then you would simply assess those actions under the standards we have already discussed and without regard to this

efforts protected under *Noerr* and the threat to turn off service was lawful because TCI could not continue to provide service without a franchise. Under these circumstances, it is difficult to fault the district court judge for instructing the jury as it did and in permitting TCI to argue that it was simply exercising its first

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instruction. Finally, if you find that some of defendants' actions were legitimate attempts to influence governmental action but that some were not, then when you decide whether the evidence establishes that defendants committed any of the charged offenses, you must exclude from your consideration those actions which you find did in fact fall into that category, for they may not form the basis—in whole or in part—for any liability.

NOERR-PENNINGTON-EXCEPTIONS

However, the activity we are discussing must consist of genuine efforts to influence governmental action or to vindicate rights through the courts. Protection does not extend to purported petitioning that is a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business of a competitor. That is, protection does not extend to activities that are merely a pretext for inflicting on plaintiff an injury not caused by any government action. Thus, you must consider whether defendants' activities were not really an attempt to influence an official to take official action, but instead were an attempt to interfere directly with the business of plaintiff. When deciding this question, you must consider the intent of defendants in taking such actions. If you find that their intent was to obtain some governmental action, no matter what the action was, then these activities were genuine. The success of defendants' efforts is evidence of their genuineness.

In the context of defendants' lawsuit against the City, about which you have heard some evidence, you must decide whether defendants filed the suit with the hope of obtaining a judicial ruling in their favor, or whether the suit was only intended to directly injure plaintiff in some manner. The extent to which a lawsuit involves legitimately disputed issues is circumstantial evidence of the genuineness of the suit. The knowledge that defense of the litigation might impose burdensome costs upon the City would *not* be sufficient to establish that defendants brought the suit in bad faith, in an attempt to injure plaintiff.

Finally, the Constitution does not protect attempts to influence governmental action by methods which are illegal in and of themselves; for example, by bribery of governmental officials. Such actions are not legitimate attempts to petition the government.

In sum, you must decide whether all or some of defendants' activities were legitimate and genuine efforts to obtain a franchise from the City. All such efforts must be excluded from your consideration of this case because they cannot—as a matter of law—form the basis of liability for any of the offenses charged.

amendment rights when it engaged in the course of conduct that it did.

Third, the trial court's jury instructions adequately informed the jury of the *Noerr-Pennington* doctrine and that it could find that TCI's activities were protected activities within the parameters of this doctrine. Instruction Number 15 informed the jury that it could "not consider TCI's 1981 lawsuit against Jefferson City to have been unlawful conduct even if it was designed to eliminate competition." Instruction Number 14 informed the jury:

> In deciding whether defendants engaged in any unlawful conduct in this case, you are instructed that you may not consider defendant's legitimate lobbying efforts with the Jefferson City officials. The defendants are entitled under the law to use genuine efforts to influence public officials but if in fact defendant's lobbying activities included threats, intimidation, coercion or other unlawful acts, then you may find that such activities were not genuine efforts to influence public officials and you may consider those acts to have been unlawful conduct.

TCI contends that Instruction Number 14 allowed the jury to base its verdict on activities which were lawful under *Noerr-Pennington.* We reject this argument because we find that the instruction's statement that *Noerr-Pennington* protects all "genuine" lobbying efforts but does not protect "threats, intimidation, coercion, or other unlawful acts" which were "not genuine efforts to influence public officials" was proper under the case law, the facts of this case, and in light of the instructions submitted by the parties.

In *Noerr,* the Court stated that when a "campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor * * * the application of the Sherman Act would be justified." *Noerr,* 365 U.S. at 144.[11]

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[11] The *Noerr* court noted, however, that the defendants' activities—even though they included misrepresentations and unethical conduct—were not covered by the Sherman Act at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. 365 U.S. at 140-

In *Pennington,* 381 U.S. 657, however, the Court cautioned:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed.

Id. at 670.

In *California Motor Transport,* 404 U.S. 508, the Court first applied the so-called "sham exception" to the *Noerr-Pennington* doctrine. There, the defendants maintained a trust fund which they used to oppose all license applications by their competitors with or without probable cause and regardless of the merits of the applications. The Court affirmed the Ninth Circuit's reversal of a district court order dismissing plaintiff's antitrust action on *Noerr-Pennington* grounds because it found that the defendant's activities may not have been genuine efforts to influence the government but instead may have been simply a "combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the

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42. The unethical conduct referred to involved the defendants' use of the so-called "third-party technique"—a misrepresentation through which the railroad defendants' attempts to gain passage of laws favorable to railroads and unfavorable to the plaintiff trucking companies were made to appear as originating from independent parties. However, even though the use of this third-party technique involved misrepresentation as to the source of the petitioning, the position advanced by the defendants—essentially that trucks were harmful to the state's highways and interfered with motorists' rights — was a legitimate one, "conducted along lines normally accepted in our political system," *id.* at 145, even though anti-competitive. The case before us is distinguishable in that the jury could properly have found, based on the facts and the court's instructions, that TCI's activities, more than being simply anti-competitive, were not genuine lobbying activities at all but instead were heavy-handed attempts to directly interfere with the business relationships of a competitor, to disturb the political process and to coerce the City into extending TCI's monopoly position, even though Central offered a superior cable system at lower cost. Much of TCI's "lobbying" made no attempt to provide the City with information on which to base a reasonable choice but, instead, sought to subvert the franchising process.

agencies and courts, to defeat that right by massive, concerted, and purposeful activities." 404 U.S. at 515.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973). [sic] the Court described *California Motor Transport* holding

> that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the "mere sham" exception announced in *Noerr.*

Id. at 380.

This Court has on numerous occasions explored the meaning of the *Noerr-Pennington* doctrine and its "sham" exception. For example, in *Mark Aero, Inc. v. Trans World Airlines, Inc.,* 580 F.2d 288, 296-98 (8th Cir. 1978), we summarized the facts and holdings in *Noerr, Pennington* and *California Motor Transport* and then examined the meaning of the "sham exception:"

> [T]he essential element of the sham exception, whether employed in an adjudicative or nonadjudicative setting [is] an absence of a genuine effort to influence government but, rather, an intent to injure a competitor directly.
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> The fundamental question presented in each case involving the "sham" exception, whether argued in a nonadjudicative or an adjudicative setting, is the question of intent. * * * As always in deciding questions of intent, the court considers all of the surrounding circumstances and assigns to each circumstance an appropriate weight, dependent upon the function and significance of each. Thus in *California Motor* the Court considered the "manner of exercise of the right of association and petition," the defendants' other activities against competitors, and the adamant stand taken in defendants' opposition to other applications, all to ascertain whether there was a true intent to injure competitors directly rather than to influence governmental action. The distillation of all of the applicable factors in each case governs the decision as to true intent, whether it is to directly injure competitors rather than to influence governmental action. In *California*

> *Motor* a consideration of all of the factors lead the Court to conclude that the allegations came within the sham exception in the *Noerr* case, "as adapted to the adjudicatory process" in that the defendants' purpose was to deny a competitor "free and meaningful access to the agencies and courts."[12]

We also quoted with approval from an antitrust commentator that "[c]onstruing the sham exception as enunciated in *Noerr* to include all activity not genuinely designed to influence the government is more consonant with the Court's central ruling." 580 F.2d at 296, *citing D. Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 105 (1977).

In *Westborough Mall v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. at 945 (1983), we again elaborated on the "sham" exception to the *Noerr-Pennington* doctrine. There we held:

> [T]he defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions. *See Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096, 1099 (9th Cir.), *cert. denied,* 404 U.S. 826, 92 S. Ct. 57, 30 L.Ed.2d 54 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1296-1298 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S. Ct. 701, 30 L.Ed.2d 736 (1972). The *Noerr-Pennington* doctrine was not "intended to protect those who employ illegal means to influence their representatives in government." *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150, supra,*

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[12] The plaintiff in *Mark Aero* was an air taxi operator who wanted to reopen the Kansas City Municipal Airport for commercial flights. Two of the plaintiff's competitors opposed the reopening by conducting a publicity campaign and by exerting pressure on public officials. No illegal activities were alleged, as in the case before us, although Mark Aero did allege that the defendants "induced others to make false and misleading statements" and used "economic coercion" on City officials. We held that the defendants' activities were protected by *Noerr-Pennington* because "none of the defendants' alleged wrongful acts constitute more than joint efforts to influence the City officials' decision in the airport controversy." 580 F.2d at 296.

> 440 F.2d at 1099. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, *supra*, § 46.04[3] at 46-55. In *Gorman Towers, Inc. v. Bogoslavsky*, [626 F.2d 607 (8th Cir. 1980)] *supra*, we recognized that actions beyond "traditional political activity" may not be protected by the *Noerr* exemption. *Id.*, 626 F.2d at 615. Because the plaintiffs have presented facts that support an inference of unlawful conduct—city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning—the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment. *See Federal Prescription Service, Inc. v. Pharmaceutical Ass'n*, 663 F.2d 253, 266 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928, 102 S. Ct. 1293, 71 L.Ed.2d 472 (1982).[13]

693 F.2d at 746.

In the *Sacramento* decision cited in *Westborough Mall*, the United States Court of Appeals for the Ninth Circuit stated:

> [I]t does not seem to this Court that the doctrines of *Noerr* and *Pennington* were intended to protect those who employ illegal means to influence their representatives in government. These doctrines were enunciated to see that the antitrust laws did not impede the free flow of communication between the people and the government. But there can be little reason to extend the special immunity of *Noerr* and *Pennington* to a type of "communication" which includes threats and other coercive measures. There is no room for such tactics in a democratic system.
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> In the case before us it was alleged that the defendant unions influenced the State Fair officials by means of threats, intimidation and other coercive measures. The doctrines of *Noerr* and *Pennington* are not, therefore, applicable.

440 F.2d at 1099.

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[13] TCI alleges that the defendants in *Westborough Mall* attempted to bribe public officials. However, our reading of that case reveals that it did not invoke the sham exception on grounds of bribery but on the ground that the plaintiffs might be able to prove an illegal conspiracy between defendants and the City which included illegal private negotiations such as those at issue in the case before us.

See also In Re IBP Confidential Business Documents Litigation, 755 F.2d 1300, 1313 (8th Cir. 1985) (*Noerr-Pennington* doctrine cannot be extended to "activities which, although 'ostensibly directed toward government action,' are actually nothing more than an attempt to harm another" or to "false communications" or to tortious, violent, defamatory or other illegal acts [citations omitted].).

We think that the trial court's jury instruction adequately informed the jury of the *Noerr-Pennington* doctrine and the sham exception.[14] The instruction does not have the problem that the instruction which was disapproved in *Pennington* had. It does not state that legal petitioning activities can be illegal if accompanied by anti-competitive intent. Instead, it describes the essence of the "sham" exception—were defendant's petitioning activities genuine attempts to influence government action, or were they designed to directly interfere with the business relationships of a competitor?

Finally, our review of the record reveals full support for the jury's and trial judge's conclusion that TCI overstepped the boundaries of *Noerr-Pennington* protection. Much of TCI's campaign was not directed at informing public officials or the public of TCI's position. Instead, TCI sought to distort the process by refusing to participate in the RFP process, by threatening the City's consultant and one of its competitors, by withholding the past due franchise fee, by attempting to interfere with Central's financing, and by coercing the City into holding private negotiations in violation of the RFP terms and Missouri's sunshine laws. Indeed, TCI's argument would

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[14] TCI also alleges that the trial court's conspiracy instruction "essentially negated" the *Noerr-Pennington* defense. We reject this argument. First of all, TCI did not specifically raise this objection below, and thus we could order a new trial on this basis only if the alleged error is "plain error." In any event, we find TCI's oblique argument to be completely without merit. We find nothing in the conspiracy instruction which negates the *Noerr-Pennington* instruction. The jury was informed that "each * * * instruction is equally binding upon you." Conspiracy Instruction Number 11 read along with Instructions Number 21 and Number 14 (*Noerr-Pennington*) fully informed the jury that before any antitrust liability could be imposed, it had to find that TCI "knowingly entered into a combination or conspiracy" and that in determining liability, it could not consider TCI's "legitimate lobbying efforts."

effectively repeal the sunshine laws and administrative laws prohibiting *ex parte* contacts. TCI's argument that *Noerr-Pennington* allows them to engage in excessive and intimidating conduct proved too much for the trial judge and jury, and it proves too much for us.[15]

C. State Action Defense.

TCI contends that Central could not have a cause of action under the antitrust laws because the City is immune under the state action doctrine. Central contends that this argument is without merit because there is no clearly and affirmatively expressed policy of the Missouri legislature directing the City to displace competition, and TCI's agreement with the City is not in furtherance of any such policy. Central also argues that, in any event, TCI did not raise its "state action" argument in its answer, motion to dismiss, motion for summary judgment, pretrial filings, or its statement of issues in this Court. It points out that, in fact, TCI took precisely the opposite position below, stating in its j.n.o.v. motion that the City's actions were not "state action." Although we doubt that TCI's "state action" argument has merit, we decline to reach it because "defenses

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[15] Central raises several other reasons why TCI's conduct was not protected under *Noerr-Pennington*. Although some of these arguments may have merit, we need not reach them here. Central argues that the *Noerr-Pennington* doctrine is inapplicable here because this case involves a municipality acting in an essentially commercial rather than in an executive, legislative or adjudicatory capacity. *See, e.g., Sacramento,* 440 F.2d at 1099; *Hecht v. Pro-Football, Inc.,* 444 F.2d 931, 941-42 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); *George R. Whitten, Jr. v. Paddock Pool Builders, Inc.,* 424 F.2d 25, 33 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970). Central also argues that TCI's conduct cannot be described as merely "political" in nature because the ultimate act it sought from the City, the award of a cable television franchise, is not protected "state action" because there is no clearly and affirmatively expressed policy in Missouri authorizing cities to displace competition in the cable television industry. *See, e.g., Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). Finally, Central argues that the *Noerr-Pennington* doctrine is inapplicable because the jury found that there was an illegal conspiracy between TCI and certain City officials, including Utterback and the mayor. *See, e.g., Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1566-67 (5th Cir. 1984), *cert. denied,*—U.S.—106 S. Ct. 788 (1986); *Duke & Co. v. Foerster,* 521 F.2d 1277, 1281-82 (3d Cir. 1975).

not raised or litigated in the trial court cannot be urged for the first time on appeal." *Gardner v. Meyers*, 491 F.2d 1184, 1190 (8th Cir. 1974).

D. Evidentiary Rulings.

TCI raises numerous objections to the trial court's evidentiary rulings and contends that the trial court gave improper and confusing instructions to the jury. After a thorough review of the record, the jury instructions as a whole, and the trial court's lengthy explanation of its evidentiary rulings and jury instructions, we find that many of TCI's objections were not properly preserved for appeal and, in any event, that the trial court did not abuse its discretion in its evidentiary rulings, that the jury instructions adequately stated the law, and that the court's allowance of ninety minutes per side for closing arguments was not an abuse of discretion.

E. Monopoly Power in a Regulated Market.

TCI contends that, as a matter of law, it could not have possessed monopoly power because Jefferson City regulated price and entry in the cable television business. We reject this argument. Monopoly power is the power to control prices or exclude competitors. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Here, TCI had the power to raise the price of "premium" channels without the approval of the City. Most significantly, TCI used its entrenched position and the various unethical or illegal practices outlined in our *Noerr-Pennington* discussion to exclude competition.

TCI miscites our decision in *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985), as establishing that a company cannot possess monopoly power in a regulated market. There, the United States Tax Court contracted on a yearly basis for court-reporting services. The court allowed contractors who performed satisfactorily to renew their contract at the previous year's rate. If, however, the contractor wanted to raise his price, the court put the contract out for bid. When National Reporting Company, which had the current contract, requested a price increase, the court let the contract out for bid. Alderson Reporting Company submitted a

bid more than 300 percent lower than National's bid, and received the contract. National then brought an antitrust action against Alderson, alleging that Alderson submitted a predatory below-cost bid with the intent to drive competitors out of the market and create a monopoly. We reversed a district court judgment in favor of National, and held that Alderson could not possess monopoly power because it did not have the power to control prices or exclude competition. National's theory was that Alderson submitted a predatory bid and then would increase prices the next year. However, we pointed out that as soon as Alderson raised its price, the contract would be put out for bid and that "[c]ompetition is alive and well in the relevant market." *Id.* at 1023.

That factual situation is completely inapposite to our case. Unlike TCI, Alderson had not threatened competitors into not submitting bids, and it took no other action to destroy the competitive bidding process. The mere fact that the Jefferson City cable market is regulated cannot hide the fact that TCI had monopoly power in the market, and it used that power and other methods other than superior ability to exclude competition. As the United States Supreme Court stated in *United States v. Otter Tail Power Co.*, 410 U.S. 366, 372 (1973), "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws."

F. Sufficiency of the Evidence on the Conspiracy Count.

TCI contends that we must overturn the jury's verdict on Section One of the Sherman Act because there is insufficient evidence of a conspiracy or combination. Central contends that TCI is merely repeating an argument rejected by the jury, and it argues that if there is any evidence supporting the jury's finding of a conspiracy, the finding must be upheld. *Citing Weiss v. York Hospital,* 745 F.2d 786, 814 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 1777 (1985). TCI contends that it was selected because this was the "best" business decision for the City, even though Central offered a state-of-the-art system with a greater number of channels and better picture quality at a lower price.

TCI stresses that there would have been an interruption in service if Central had been chosen, and that the mayor and other City officials were merely responding to this eventuality. "An inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions * * * as with [anti-competitive joint action]." *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978).

Central contends that TCI's argument "emphasizes the innocuous and ignores the ominous." *Corey v. Cook*, 641 F.2d 32, 35 (1st Cir. 1981) (holding that concerted action by city officials and a parking lot operator designed to subvert normal commercial bidding and exclude the plaintiff violated Section One of the Sherman Act). Central contends that the record reveals abundant evidence that various City officials were coerced and pressured into an anti-competitive position. We find this a difficult question. Nonetheless, after reviewing the lengthy record in detail, we believe that overturning the jury's conspiracy verdict would require us to review the evidence *de novo* and to accord little respect for the verdict of what the trial judge termed was "an extremely attentive jury." *Central Telecommunications*, 610 F. Supp. at 894.

G. Damages.

1. Fact of Damage.

TCI contends that under *Duff v. Kansas City Star Co.*, 299 F.2d 320 (8th Cir. 1962), an unestablished business cannot recover for injury to "business" under section 4 of the Clayton Act. There, we stated that a plaintiff may not recover antitrust "damages by reason of loss of anticipated profits in an anticipated business." *Id.* at 323. However, this statement must be read in light of the facts in *Duff*. Duff had operated a small weekly newspaper in Kansas City, Missouri. After eight years of non-publication due to a newsprint shortage during World War II, he unsuccessfully sought to reenter the newspaper business. He claimed that his inability to start up a newspaper again was due to an attempt by defendant to monopolize the market. The district court dismissed his antitrust action on the ground he had no "business or property" which could have been injured. This Court affirmed, finding: "After eight years

of non-publication appellant possessed neither business nor property, including goodwill, which could have been damaged[.]" *Id.* at 325. Stressing that Duff had not made any large capital expenditures, did not own a copyrighted name for a newspaper which had a value, and did not have subscription, advertising, or financing commitments, the Court stated that Duff "was in no different position than any stranger who might arrive in Kansas City with the desire or wish to enter the newspaper publishing field and who claimed that because of appellees' monopoly he was prevented from doing so." *Id.* at 323.

Although neither the Supreme Court or this Court has had occasion to expound on the meaning of *Duff*, at least seven of the Circuit Courts of Appeal,[16] as well as numerous district courts,[17] and the Supreme Court by implication[18] have ruled

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[16] *Parks v. Watson*, 716 F.2d 646, 659-60 (9th Cir. 1983); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); *Huron Valley Hospital Inc. v. City of Pontiac*, 666 F.2d 1029, 1033 (6th Cir. 1981); *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1978), *cert. denied*, 444 U.S. 1078 (1980); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 987-88 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Triangle Conduit & Cable Co. v. National Electric*, 152 F.2d 398, 400 (3d Cir. 1945); *Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.*, 166 F. 254 (2d Cir. 1908).

[17] *See, e.g., Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, 1095 (D. Md. 1969); *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 307 (D. Colo. 1969).

[18] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-28, 23 L.Ed. 1562 (1969) (On the related question of whether the plaintiff, as a condition of maintaining a treble-damage action, must prove that he made a demand for the excluded product or service, the Court stated: "The issue is whether, once the embargo was lifted, Zenith wanted to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its 'business or property by reason of anything forbidden in the antitrust laws.' If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4." (Footnote omitted.)

that an unestablished business can recover future lost profits under the federal antitrust laws if a sufficiently advanced state of preparation for entering a market has been achieved. For example, the same year that *Duff* was decided, the United States Court of Appeals for the Fifth Circuit rejected a contention that *Duff* established that a business in the planning stage may never recover anticipated profits under the federal antitrust laws:

> Defendant's argument necessarily presupposes that when Congress authorized treble damage suits it meant to distinguish between the rights of persons who are put out of business and the rights of persons who are kept out of business by a conspiracy. It is unreasonable to suppose that such a distinction was intended by Congress. The purpose of the anti-trust laws is to promote competition and to prevent its restraint. This purpose is no less thwarted when a person who intends and is prepared to embark in trade is stopped at the outset, than it is when a going business is brought to a standstill. It is as unlawful to prevent a person from engaging in business as it is to drive him out of business. Thomsen v. Union Castle Mail S. S. Co., 2 Cir., 1908, 166 F. 251, 253. The restriction which defendants would place upon the meaning of the word "business" is unwarranted in the context of its Clayton Act usage.
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> We see no conflict in the holding of the Duff case with the decision reached here. First, the Duff case presents facts entirely different from those under consideration here. Indeed, the trial court likened the plaintiff in Duff to a stranger who might enter Kansas City "with the desire or wish" to enter the newspaper publishing field; which is to say that the "desire or wish" is all the stranger had. No property was involved. In effect, the court held that there was no established business (good will) to which the name or trademark there involved attached.
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> [By contrast, the plaintiff here] was guilty of no lethargy or speculative assertion of a mere wish, desire or intention to

> engage in business. In July he bound himself by the terms of a contract, which the evidence indicates would have been in performance in December. The alleged conspiracy stopped him cold in November. It is our opinion that Young was "injured in his business or property".

North Texas Producers Association v. Young, 308 F.2d 235, 243 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963).

A respected commentator has aptly summarized the now-established majority view:

> The plaintiff will be deemed to have an existing "business" if he has an intention to do so and has made a sufficient degree of preparation toward entering the market or industry. The four elements that the courts have considered in determining the degree of intention and preparedness are:
>
> (1) the plaintiff's background and experience in his prospective business;
>
> (2) affirmative action on the plaintiff's part to engage in the proposed business;
>
> (3) his ability to finance the business and to purchase the necessary equipment and facilities to engage therein; and
>
> (4) His consummation of contracts.

10 Von Kalinowski, Antitrust Laws and Trade Regulation, § 115.02[3][i] (1968) (footnotes omitted). *See also e.g.*, *Parks*, 716 F.2d at 660.

We agree with the conclusion of the United States Court of Appeals for the Fifth Circuit in *North Texas Producers Association* that *Duff* is consistent with this majority view, but simply holds that Duff had not shown sufficient business or property interests to recover for injury to "business or property" under section 4 of the Clayton Act.

The district court tracked this view by instructing the jury that "[i]t is necessary that plaintiff cause you to believe from

the evidence an intention and preparedness to enter the cable television market in order to recover for its loss in this case." TCI does not challenge this instruction on appeal. Our review of the record supports the jury's conclusion that Central had made sufficient preparations to enter the cable television business to recover for injury to "business" under section 4 of the Clayton Act. Central had experience and expertise in the cable field, had raised over $300,000 in capital with commitments of an additional $200,000 in capital, had secured financing commitments in excess of $1.5 million, had submitted detailed feasible plans for its cable system in Jefferson City and had secured the vote of the City Council for an operating franchise.

TCI also contends that the tortious interference verdict must be reversed because under Missouri's tortious interference law, an unestablished business cannot recover anticipated profits unless plaintiff proves past income and expenses as the basis for computing them. *Citing Coonis v. Rogers,* 429 S.W.2d 709, 713-14 (Mo. 1968). However, our review of Missouri law reveals that this argument is too extreme. A more detailed, accurate and recent description of Missouri law was provided in *Budget Rent-A-Car v. B & G Rent-A-Car,* 619 S.W.2d 832, 836-37 (Mo. App. 1981), where the court wrote:

> [T]he loss of profits, whether past or future, claimed to arise out of exclusion from a market is customarily not susceptible of detailed or direct proof, and * * * unless proof of an inferential character is permitted, the result would be to immunize a defendant from the consequences of his wrongful acts. That principle has been frequently enunciated by the Supreme Court of the United States in the context of actions to recover damages resulting from violations of the Federal antitrust laws. * * * The principle is equally applicable where the claim of lost profits arises from a violation of fiduciary obligations or breach of contract. * * *
>
> * * * "The assessment of damages by a trial court sitting without a jury will not be set aside unless manifestly

erroneous; and may be upheld if it falls within the range of estimates given by expert witnesses."

[There has been an] evolution away from the demand for proof of certainty in damages in actions of this nature in * * * Missouri. * * * Anticipated profits were generally not recoverable. *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968), but note the further quote, " 'They [anticipated profits] may be recovered only when they are made reasonably certain of proof of actual facts, with present data for a rational estimate of their amount; and, when this is made to appear, they may be recoverable.' " * * * "[T]he law is also well settled that damages may be recovered for loss of profits due to the breach of a contract if the evidence is sufficiently certain and definite to warrant the jury in estimating their extent." * * * "It has been said, however, that the amount of estimated loss of earnings (and the same would apply to loss of prospective profits) should, in the event of uncertainty, at least be supported by the best evidence available." * * *

* * * *

* * * "Where computation of damages is made uncertain by the nature of the breach of contract, '[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' * * * [.]" [Citations omitted.]

Similarly, in *Coach House of Ward Parkway v. Ward Parkway Shops*, 471 S.W.2d 464, 472-73 (Mo. 1971), the Court stated:

Defendant relies on a line of cases exemplified by Coonis v. Rogers, Mo., 429 S.W.2d 709, and Anderson v. Abernathy, Mo., 339 S.W.2d 817, for the general proposition of law to the effect that recovery of anticipated profits of a commercial business are too remote, speculative to warrant recovery except where they are made reasonably certain by proof of actual facts with present data for a rational estimate of their amount. This is and has been the rule in Missouri. However, in Hargis v. Sample, Mo., 306

> S.W.2d 564, 569, also cited by defendant, this court in speaking of the certainty with which loss of profits must be shown said: "True, in some cases all that can be required is to produce all the relevant facts tending to show the extent of damage and one is not to be excused for a breach of contract resulting in damages simply because those damages may not be established with exact certainty. Wright v. Ickenroth, Mo. App., 215 S.W.2d 43, 45. It has been said, however, that the amount of estimated loss of earnings (and the same would apply to loss of prospective profits) should, in the event of uncertainty, at least be supported by the best evidence available. Moss v. Mindlin's, Inc., Mo., 301 S.W.2d 761, 773."
>
> We believe this case comes within [this] rule * * * where if the breach exists, the experience of mankind is convincing that a pecuniary loss has occurred while at the same time the exact amount of damage is not susceptible of being ascertained with certainty.

The Court in *Coach House* then held that damages for lost profits could be recovered, on remand, on the basis of the testimony of an expert witness on the estimated loss of business due to the violation at issue.

We think this is the type of case where the damage award was based on the best evidence available, and where the estimate of loss is reasonable and thus is not too speculative under Missouri law. In sum, we hold that Central has sufficiently proved that it suffered damage to a protectable interest under the federal antitrust law and the State of Missouri's law on tortious interference with a business expectancy.

2. *Measure of Damages.*

TCI contends that Central's damage theory was "irrational" and overcompensatory because it allegedly failed to deduct all the "start-up" costs of the business. Central's theory was that it should receive the fair market value of the lost franchise, and this value was ascertainable through use of an

"industry rule of thumb"—ten times cash flow in Central's proposed third year of operations. Central cites controlling authority that the fair market value of a business has long been a recognized measure of damages for a precluded plaintiff in antitrust cases, *see, e.g. Arnott v. American Oil Co.*, 609 F.2d 873, 887 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); *Albrecht v. Herald*, 452 F.2d 124 (8th Cir. 1971). *See also Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1011 (S.D. Tex. 1981), *rev'd on other grounds*, 735 F.2d 1555 (5th Cir. 1984). Central also cites to *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 148 (3d Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 564 (1984) where the Court approved the use of an industry rule of thumb—a multiplier times vested renewal income—to determine fair market value.

Central introduced a detailed damages study and extensive supporting testimony. The jury arrived at an actual damage amount of $10.8 million. Central points out that TCI itself suggested that the fair market value of the Jefferson City cable franchise was between $7.7 and $15 million. Although the damage award is large, we have concluded that we are obligated under controlling authority and the facts of the case to affirm. First of all, the Supreme Court has repeatedly made clear that once the fact of damage is established, the amount of damages requires a lesser degree of proof. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981) ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury. * * * The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.") For example, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969), the Court held that antitrust damages could be awarded on the basis of plaintiff's estimates of sales it could have made absent the violation:

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is

> available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

A respected commentator has summarized the law on the measure of antitrust damages as follows:

> The amount of damages may be established by evidence of facts from which some calculation may be logically and legally inferred. If the inference upon which the award is based is reasonable, the plaintiff may recover a sum in damages even if it is merely an approximation.

10 Von Kalinowski § 115.02[2] (1968) (footnotes omitted). Similarly, the United States Court of Appeals for the Seventh Circuit has recently reiterated, in a decision affirmed by the Supreme Court: "Because a plaintiff can seldom prove the exact amount of antitrust damages, he may sustain his burden with circumstantial evidence and estimates of damages based on reasonable assumptions." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1242 (7th Cir. 1982), *aff'd in part, rev'd in part on other grounds*, 465 U.S. 752, 104 S. Ct. 1464 (1984). The law of the State of Missouri is similar with respect to damages for tortious interference with business expectancy. *See, e.g., Budget Rent-A-Car*, 619 S.W.2d at 836-37.

Central presented an estimate of damages based on reasonable industry assumptions, and the jury was entitled to infer from the evidence actual damages in an amount of $10.8 million. Our review of the award fails to reveal any error,[19] and

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[19] TCI contends, in an argument not raised before the jury, that Central's damage estimate failed to adequately account for Central's start-up costs. However, our review of the damages study reveals that start-up costs of $1.6 million were accounted for. If TCI believed this figure understated start-up costs, it should have introduced evidence on this. Given that TCI failed to raise this argument before the jury, and that there is no evidence to suggest that Central's estimate is

we could reduce the award only by acting as the *de novo* fact-finder. This we may not do.

Perhaps most significantly, Central's damage study and its expert's testimony was admitted without objection. TCI failed to introduce evidence on damages, and did not argue damages in its final argument before the jury. It is apparent that TCI made a conscious decision to "go for broke," claiming that Central could simply not receive any damages at all because TCI was not liable. The jury rejected this argument and was forced to base its damage award on the evidence before it. TCI first objected to the damages award and its method of calculation in its post-trial motion. This was too late. Accordingly, the actual damages award of $10.8 million on the antitrust (before mandatory trebling) and tortious interference claims is affirmed.

The jury also awarded $25 million in punitive damages on the tortious interference claim. TCI does not challenge this award on appeal other than contending that if the actual damages award is reversed, the punitive damages award must also be reversed. Accordingly, although the punitive damages award is large, the award was based on a jury instruction on punitive damages which was not objected to at trial or on appeal and which, in any event, accurately set forth the law of the State of Missouri. The record reveals substantial evidence of intentional tortious conduct on which the punitive damages award was based. Accordingly, we affirm the jury's award.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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unreasonable, we assume that $1.6 million in estimated start-up costs is reasonable.

TCI also suggests in passing that Central's damages' theory erroneously uses its third year of operations as the base for determining fair market value. However, TCI failed to object to this method at trial. Moreover, the third year coincided with the date of trial, and thus had a reasonable basis.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* *vs.* TCI CABLEVISION, INC., *et al.*, *Defendants.*	[FILE STAMP] No. 83-4068-CV-C-5

ORDER

Pending before the Court are the following post-trial motions: (1) defendants' motion for judgment *non obstante veredicto;* (2) defendants' alternative motion for a new trial; (3) defendants' motion for clarification of the judgment; (4) plaintiff's motion for enhancement of its attorney's fees; and (5) defendants' motion for a stay of execution pending appeal. For the reasons set forth below, the Court will make the following rulings: (1) defendants' motion for j.n.o.v., alternative motion for a new trial, and motion for a stay of execution will be overruled; (2) defendants' motion for clarification will be sustained and the judgment in this case will be amended to preclude the possibility of double recovery by plaintiff; and (3) plaintiff's motion for enhancement of its attorney's fees will be overruled.

I. BACKGROUND

On January 22, 1985, the jury returned verdicts against defendants of $10,800,000.00 on each of plaintiff's antitrust

claims,[1] and $10,800,000.00 for actual damages and $25,000,000.00 for punitive damages on plaintiff's state law claim for tortious interference with a business expectancy.[2] These verdicts were rendered by an extremely attentive jury at the conclusion of a thirty-one day trial.

Plaintiff's claims arose out of a dispute over cable television franchise rights in Jefferson City, Missouri.[3] In 1978, defendants[4] (hereinafter collectively referred to as "TCI") bought the only existing cable television franchise[5] in Jefferson

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[1] Plaintiff successfully submitted two antitrust claims to the jury: actual monopolization and conspiracy to unreasonably restrain trade. The $10,800,000.00 award is the amount of the verdict before trebling.

[2] Plaintiff concedes that it cannot recover both treble damages on its antitrust claims and punitive damages on its tortious interference claim. *See Superturf, Inc. v. Monsanto Co.* 660 F.2d 1275, 1283-84 (8th Cir. 1981); *see also* page [68a] *infra.*

[3] Jefferson City provides a very attractive market for cable television. Because the city is nestled in a hilly region on the south bank of the Missouri River, broadcast television reception is extremely poor. Only one broadcast television station is located in the city. As a result of these factors, cable television's market penetration has been extremely high in Jefferson City.

[4] There were three defendants in this case: TCI Cablevision, Inc.; Community Telecommunications, Inc.; and Telecommunications, Inc. TCI Cablevision and Community Telecommunications are wholly-owned subsidiaries of Telecommunications, Inc. According to the evidence in this case, the parent corporation controls approximately 1,000 local cable systems and is the largest cable television company in the United States. The evidence also showed that the corporate organization of the three defendants was extremely loose. Employees authorized to act on behalf of one of the companies in reality acted on behalf of all three companies. Consequently, the jury was instructed to treat all three defendants as one entity for the purpose of returning its verdicts.

[5] A "franchise" is the term commonly used to describe the license issued by a local governmental entity to a cable television operator to build and maintain a cable system in the community. The original purpose of licensing cable systems stemmed from the fact that a cable operation, like any other public utility, needs easements across both public and private property in order to gain access to individual households. Thus, in the interest of preserving the integrity of the public domain, a licensing or franchising process developed whereby a city could demand assurances of responsible behavior from a prospective cable operator.

City. By its terms, the franchise which TCI purchased was scheduled to expire in April, 1981.

As is customarily done in cities across the country, Jefferson City initiated an RFP[6] process to solicit bids to determine the recipient of the next cable television franchise. Being the incumbent operator, defendants naturally enjoyed the inside track in the competition for the next franchise. Nevertheless, city officials remained open to the option of refusing to renew TCI's franchise, particularly in view of mounting consumer dissatisfaction with existing service.

In 1980, a group of local investors formed the plaintiff company (hereinafter referred to as "Central") for the express purpose of competing for a cable television franchise in Jefferson City. Aware of the public's dissatisfaction with the incumbent operator, Central began arranging financing and responded to the city's RFP by offering expanded services for less money. In contrast, defendants refused to participate directly in the RFP process. Instead, TCI undertook various tactics designed to ensure that it could not be displaced as the sole cable television franchisee in Jefferson City. Many of these activities were performed by Paul Alden, a "troubleshooter" in defendants' franchise renewal department. For example, Mr. Alden threatened to destroy the career of Elmer Smalling, a consultant who was evaluating the RFP responses for the city. Mr. Alden also attempted to intimidate city officials by threatening to flood the Jefferson City market with satellite dishes if defendants' franchise was not renewed. This threat, as it turned out, was a complete fraud: Mr. Alden represented that his company had exclusive control over the distribution of satellite dishes in the Jefferson City area when, in fact, his company had never participated in the satellite dish business. In addition, TCI sent shock waves through the Jefferson City community by announcing to the public that all cable television services would be terminated unless its franchise was renewed. Defendants

[6] The term "RFP" is shorthand for "Request for Proposals." An RFP is, in essence, an advertisement for bids. In its RFP, the city sets forth the minimum terms and specifications for a cable television system which all prospective operators are expected to meet.

applied additional pressure on city officials by refusing to pay the city approximately $60,000.00 in past-due franchise fees unless and until their franchise was renewed. Finally, on March 16, 1981, defendants filed a multi-count lawsuit against the city and began to engage the city in protracted litigation. The gravamen of this lawsuit was the claim that the First Amendment prohibited the city from terminating an entrenched cable television operator's right to provide cable services in the community.

Notwithstanding TCI's efforts to subvert the RFP process and retain its entrenched position, city officials continued to review the bids submitted by plaintiff and other applicants. The chief competitors in the RFP process were Central and Teltran, a cable television operator based in Columbia, Missouri. The city's consultant, Elmer Smalling, rated Central and Teltran equally. In November, 1981, however, Teltran withdrew its application, thus leaving plaintiff as the best candidate for a new franchise. On January 25, 1982, the city council of Jefferson City passed an ordinance authorizing the city attorney to begin negotiating franchise documents with plaintiff. While these negotiations were being conducted, defendants continued pressuring the city to renew its franchise.

On April 16, 1982, after a series of secret meetings between TCI and various city officials, Mayor Hartsfield announced that an agreement had been reached whereby the city would renew defendants' franchise and defendants would dismiss their lawsuit against the city. Nevertheless, on April 20, 1982, the city council voted by a 7-3 majority to award a non-exclusive franchise to plaintiff. Mayor Hartsfield promptly vetoed the ordinance granting a franchise to plaintiff. The next item on the council's agenda was a proposed ordinance which would renew defendants' franchise. The council was deadlocked at a 5-5 vote. The mayor cast the tie-breaking vote and, as a result, TCI retained its position as the only cable television operator in Jefferson City.

Contending that it had been wrongfully deprived of a franchise, Central brought the instant lawsuit. TCI counterclaimed. After thirty-one days of trial, the Court granted

plaintiff's motion for a directed verdict on defendants' counterclaims. Central submitted its case to the jury on three theories: (1) conspiracy to unreasonably restrain trade; (2) actual monopolization; and (3) tortious interference with a business expectancy. The jury found for plaintiff under each theory. The post-trial motions presently before the court ensued.

II. MOTION FOR J.N.O.V.

TCI's motion for j.n.o.v. advances two primary arguments for overturning the jury's verdicts. Only these two arguments will be addressed herein; the other grounds raised by defendants are rejected as being without merit.

A. Noerr-Pennington Defense

The first substantial argument raised by defendants is that all of their allegedly wrongful conduct was protected activity within the purview of the *Noerr-Pennington* doctrine. There are two distinct components of the *Noerr-Pennington* doctrine, both of which are based on the notion that civil liability should not be imposed on persons for exercising their First Amendment right to petition the government.[7] The first prong of the *Noerr-Pennington* defense is the protection of legitimate efforts to lobby or influence public officials with respect to political action, even if those efforts are designed to eliminate competition.[8] The second strand of the *Noerr-Pennington* defense is

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[7] Although the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which seek to assign liability on the basis of the defendant's exercise of its First Amendment rights. *See In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1312 (8th Cir. 1985); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 747 (8th Cir. 1982); *First National Bank v. Marquette National Bank*, 482 F. Supp. 514, 524-25 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981).

[8] *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961); *see, e.g., First Am. Title Co. of S. Dakota v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1445-47 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d at 745-46; *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1195 (8th Cir. 1982); *see generally* Annot., 71 A.L.R. Fed 723 (1985).

the protection of genuine efforts to seek redress through the judicial process, even if the outcome of such litigation is certain to affect or eliminate competition.[9] Both the lobbying and litigation aspects of the *Noerr-Pennington* doctrine are implicated in the instant case.

1. *Litigation*

Under the *Noerr-Pennington* doctrine, participation in the judicial process cannot be asserted as a basis for civil antitrust liability "unless it may be characterized as a sham cover for what is really just an attempt to directly interfere with the business relations of a competitor."[10] The fundamental question underlying the issue of whether a lawsuit was a mere sham and thus unprotected conduct is one of intent.[11] In the instant case, plaintiff introduced evidence concerning defendants' 1981 lawsuit against Jefferson City wherein defendant had sought to enjoin the city from displacing it as a cable television operator. At first, plaintiff attempted to show that this lawsuit fell within the sham exception to the *Noerr-Pennington* doctrine.[12] As the trial progressed, however, plaintiff apparently had doubts about the sufficiency of the evidence to support a finding that the 1981 lawsuit was a sham and, consequently, withdrew the issue from the jury's consideration. The withdrawal instruction expressly directed the jury that it could not consider defendants' 1981 lawsuit against Jefferson City to have been unlawful conduct. This withdrawal instruction adequately informed the jury that defendants' 1981 lawsuit was protected litigation under the

[9] *California Motor Transport Co. v Trucking Unlimited*, 404 U.S. 508, 510-511 (1972); *see, e.g., First Am. Title Co. of S. Dakota v. South Dakota Land Title Ass'n*, 714 F.2d at 1448; *Alexander v. National Farmers Org.*, 687 F.2d at 1200.

[10] *Alexander v. National Farmers Org.*, 687 F.2d at 1200; *see generally Razorback Ready Mix Concrete Co. v. Weaver*, No. 84-1325, slip op. at 4-7 (8th Cir. May 8, 1985).

[11] *See Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978).

[12] *Cf. Alexander v. National Farmers Org.*, 687 F.2d at 1200-04 (litigation designed to harass and intimidate third parties in order to directly interfere with business relations of plaintiff held a mere sham).

Noerr-Pennington doctrine.[13] It must be assumed that the jury followed the Court's instructions and did not rely on the 1981 lawsuit in arriving at its verdicts. Defendants' arguments to the contrary[14] are contradicted by the plain language of the jury instructions.

2. *Lobbying*

As noted above, the lobbying prong of the *Noerr-Pennington* doctrine extends a cloak of immunity from civil liability to legitimate efforts to influence public officials with respect to political action.[15] It bears emphasis, however, that only *legitimate* lobbying efforts are protected; conduct that extends beyond "traditional political activity" may not be protected.[16] Thus, when accompanied by illegal or fraudulent actions, efforts to influence public officials are not exempt under the *Noerr-Pennington* doctrine.[17]

In the instant case, defendants contend that the jury's verdicts should be overturned because all of their allegedly anti-competitive conduct was protected activity within the *Noerr-Pennington* doctrine. The Court must disagree. The record clearly contained sufficient evidence to support the jury's finding that the wrongful conduct of defendants was either "sham lobbying" or not lobbying at all. For example, Paul Alden's threat to ruin the career of Elmer Smalling simply cannot be characterized as "lobbying" in the first instance. Smalling was not an elected public official, nor did his role in

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[13] Even though a lawsuit is "exempt conduct" under the *Noerr-Pennington* doctrine, it nevertheless may be considered "to the extent it tends to show the purpose or character of other, nonexempt activity." *Alexander v. National Farmers Org.*, 687 F.2d at 1196. The jury was so instructed in the instant case. *See* Instruction No. 15.

[14] *See* Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial, at pp. 10-11.

[15] *See* note 8 *supra; see also Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1566-68 (5th Cir. 1984); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982).

[16] *Westborough Mall v. City of Cape Girardeau*, 693 F.2d at 746.

[17] *Id.*

the city's RFP process involve political action; instead, he was merely a consultant to the city whose job was to evaluate a mass of technical information. In addition, the jury clearly was justified in believing that Paul Alden's threat to flood the Jefferson City market with satellite dishes was not legitimate lobbying activity; instead, it was pure fraud. As Alden admitted during his deposition, he knew that neither he nor his former employer had ever been in the satellite dish business. Finally, TCI's refusal to pay past-due franchise fees to the city unless the city renewed its franchise had nothing to do with "genuine" political activity; instead, it was nothing short of commercial blackmail. Although there was conflicting evidence on the issue, the jury's determination that TCI had strayed beyond the bounds of legitimate lobbying activity is well-supported by the record. Accordingly, defendants' contention that all of its conduct was protected by the *Noerr-Pennington* doctrine must be rejected.

B. First Amendment Defense

The second frontal assault on the verdict is the argument that defendants cannot be held liable for retaining their position in the Jefferson City cable television market because the First Amendment afforded them an absolute right to continue their cable television operation free from government interference. Defendants claim that they are entitled to First Amendment protection because their sole function is to transmit information to the public. While defendants admit that they do not produce original programming, they contend that their role as a conduit for news, entertainment, and advertising is analogous to that of *Reader's Digest*.

Although it doubts that TCI's First Amendment rights are coextensive with those of the print media,[18] this Court acknowledges that cable television operators are entitled to *some* measure of First Amendment protection. For example, govern-

[18] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377-80 (10th Cir. 1981); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976, 985 (D.R.I. 1983).

mental entities may not discriminate against a cable television operator on the basis of programming content.[19] Nor may a local governmental body artificially limit the number of cable television operators in a given market.[20] Nevertheless, it has long been the law that the First Amendment does not afford absolute immunity from antitrust liability to members of the communications industry.[21] Thus, if one cable television operator conspires or engages in predatory conduct for the purpose of eliminating its competitors, it will be liable in an antitrust lawsuit to the same extent as any other competitor in any other industry.

In essence, defendants' First Amendment argument is that they were justified, as a matter of law, in resisting Jefferson City's RFP process because the city could not constitutionally force an established cable television franchisee to cease operation at the conclusion of the franchise term.[22] Defendants further contend that, even if the Jefferson City market could support only one cable system, the city could not constitutionally displace the incumbent franchisee with a new franchisee; instead, defendants argue, they had an absolute First Amendment right to continue their operation either with or without a franchise from the city.[23] Thus, defendants'

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[19] *See Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 (9th Cir. 1985); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127; *Community Communications Co. v. City of Boulder*, 660 F.2d at 1376; *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

[20] *See Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336-38 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1411.

[21] *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945).

[22] *Cf. Carlson v. Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mo. Mich. 1985) (dismissing First Amendment claim of cable television operator whose franchise had been revoked by local governmental entity).

[23] The inescapably ironic spectre implicit in this argument is that a cable system—such as TCI's system in Jefferson City—which was allowed to expand and prosper for years under the protective mantle of an exclusive franchise can now use the First Amendment as a shield to ward off competition and maintain its entrenched position.

position is that Jefferson City's RFP process was illegal as a matter of federal constitutional law and that, consequently, all of TCI's efforts to retain its place in the Jefferson City cable television market were lawful.[24]

If the Court agreed with defendants' argument in its entirety, plaintiff's complaint would have been dismissed a long time ago. However, defendants' argument misstates the applicable law and misperceives the theory of the case that was submitted to the jury.

1. *The First Amendment and Cable Television*

There are two primary areas of interface between cable television and the First Amendment. First, there is the matter of governmental regulation of programming content. It is well-settled that, absent some compelling governmental interest, such content regulation is impermissible.[25] This aspect of the First Amendment was not implicated in the instant case; there was simply no evidence that Jefferson City engaged in content-based regulation.

The second area of interface between cable television and the First Amendment surrounds the franchising process whereby local governmental entities regulate access to cable television

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[24] In support of its position, TCI draws an analogy to the print media: just as the government has no authority to dictate who may or may not run the sole newspaper in a community, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974), TCI insists that a city may not decide who may operate the sole cable television system in a given market. As will be discussed *infra*, there are two fundamental flaws in defendants' argument: (1) the law applicable to cable television differs from the law applicable to print media in that, to the extent that a given market can support only one cable system, a city does have the authority to select the best applicant for a *de facto* exclusive franchise; and (2) regardless of whether or not a market can support more than one system, a cable operator cannot use the First Amendment as a shield when it engages in anticompetitive and predatory conduct for the purpose of maintaining its monopoly power over the market.

[25] *E.g., Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Videophile, Inc. v. City of Hattiesburg*, 601 F. Supp. 552 (S.D. Miss. 1985).

markets. This area has provided fertile ground for litigation in recent years.[26] The only legal principle on which virtually all courts have agreed is that local governmental entities have *some* authority to regulate television operators in the interest of minimizing the inevitable disruption of the public domain occasioned by the installation of cable television systems.[27] In addition, it is noteworthy that federal law has acknowledged the authority of a local governing body to "award one or more franchises within its jurisdiction."[28] Thus, it appears safe to say that cities, such as Jefferson City, enjoy the power to license cable television operators within their geographic spheres of influence.

A more difficult problem arises, however, when a local governmental entity seeks to place a limit of the number of franchisees in its jurisdiction. Although the law in this area is far from settled, the emerging answer appears to be that the grant of a single cable franchise is permissible only if the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation.[29] The theory is that,

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[26] *See, e.g., Tele-Communications of Key West, Inc. v. United States*, 757 F.2d at 1335-39; *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1401-11; *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125-29; *Community Communications, Inc. v. City of Boulder*, 660 F.2d at 1375-80; *Carlson v. Village of Union City*, 601 F. Supp. at 809-812; *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553, 1561-65 (N.D. Cal. 1984); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543, 547 (W.D. Ky. 1982).

[27] *E.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1406; *see also Community Communications, Inc. v. City of Boulder*, 660 F.2d at 1377-78 ("[s]ome form of permission from the government must, by necessity, precede such disruptive use of the public domain").

[28] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 621(a)(1) (1984); *see also id.* § 621(b)(1) (prohibiting operation of cable television system without a franchise); H. R. Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4655, 4696 (Cable Communications Policy Act of 1984 "grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area").

[29] *See Tele-Communications of Key West, Inc. v. United States*, 757 F.2d at 1338; *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127; *Community Communications, Inc. v. City of Boulder*,

where physical and economic factors render a market incapable of accommodating more than one cable television system, the local governing body is in the best position to determine which proposed system offers the best service to the public for the lowest cost. Since only one operator can survive in the market, it makes sense to allow the local government to choose the best applicant.[30] Otherwise, as a result of the enormous start-up costs of constructing a cable television system,[31] no one would dare compete in a natural monopoly-type market with an incumbent operator even if the incumbent was providing poor service to the consuming public. The initial investment would be too great to risk on the hope of wresting the entire market away from the incumbent. Thus, the incumbent operator would remain in a firmly entrenched position regardless of the quality of its system. Consequently, in a natural monopoly situation, the First Amendment should tolerate a franchising process whereby a city may periodically award an exclusive franchise to the applicant which offers the best package to the public.[32]

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660 F.2d at 1378-80. *But cf. Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1404-05. A "natural monopoly" situation exists where "a market has room for only one firm." *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125; *see generally Byars v. Bluff City News Co.*, 609 F.2d 843, 853 n. 27 (6th Cir. 1979).

[30] Allowing local governmental entities to select the most qualified applicant is the most logical allocation of authority for two reasons. First, because cable systems can operate profitably only in areas of relatively high population density, each system typically serves only one community. It would be extremely unusual for a cable system to serve the rural area situated between two towns. Consequently, the local governing body is not too small to handle the job of regulating cable operators. Second, the local governing body is not too big for the job. In contrast to a state or federal regulatory body, which likely would respond to the idiosyncrasies of a particular community with bureaucratic insensitivity, local governmental entities are ideally sized to meet the needs of their constituents.

[31] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 126; *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. at 986.

[32] Such a scheme acknowledges that a local governmental entity is not a competitor of cable operators, but "a representative of the potential customers of these companies." *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125-26. Although TCI insists that the First Amendment was designed to allow each individual customer

On the other hand, if a given cable television market does not have natural monopoly characteristics, the justification for limiting the number of franchisees disappears. If the market can support more than one cable system, it no longer makes sense to force prospective operators to compete for a single franchise. Nor does it make sense to allow the local governmental body to act as the guardian of the public's interest. Instead, the surest method of determining which operator best fulfills the needs of each consumer is to grant licenses to all qualified applicants and to let them compete in the marketplace.

In a nutshell, then, the determinative factor with respect to a city's power to restrict the number of cable television franchisees is whether economic and physical conditions in the relevant market give rise to a "natural monopoly" situation. If the market has room for only one firm, it makes sense to require all prospective franchisees to compete "for" the market and to allow the local governing body to make the decision as to which cable system will best serve its constituents. But, if a market has room for more than one cable system, a city's efforts to artificially limit the number of operators would constitute a prior restraint in violation of the First Amendment.

2. *The Theories of the Case*

In order to obviate TCI's First Amendment concerns, the jury instructions in this case were carefully tailored to ensure that the jury could not return a verdict for plaintiff under

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to choose which cable system to subscribe to, TCI's concern for the rights of consumers rings hollow. In a natural monopoly-type market, individual consumers have no choice among competing systems. Thus, the franchising process actually enhances the power of consumers by allowing a local governing body to engage in a form of collective bargaining with franchise applicants. Through the franchising process, consumers realize two principal advantages. First, the franchise agreement imposes certain obligations on the cable operator which must be performed upon penalty of termination. *See Carlson v. Village of Union City*, 601 F. Supp. at 812. Second, the fact that a franchise has an expiration date gives the franchisee incentive to provide good service or risk losing its bid for renewal. Otherwise, as the evidence showed in the instant case, the incumbent operator is prone to become lackadaisical.

circumstances where defendants had a valid First Amendment defense to plaintiff's claims. As stated in Instruction No. 20, plaintiff submitted its case under two divergent theories. First, the jurors were instructed that if they found that physical and economic conditions in the Jefferson City cable television market gave rise to a natural monopoly, they must focus on whether defendants engaged in anti-competitive or predatory conduct with respect to competition *for* the market. Second, the jurors were instructed that if they found that a natural monopoly situation did not exist as of April, 1982, they must focus on whether defendant engaged in anti-competitive or predatory conduct with respect to competition *in* the market. Assuming that the jury heeded this "fork-in-the-road" instruction as well as all other instructions, it is apparent that all questions of fact underlying defendants' First Amendment argument were considered and resolved by the jury.[33]

(a) *Natural Monopoly Theory*

Under the "fork-in-the-road" jury instruction described above, the jury was permitted to consider whether market conditions gave rise to a natural monopoly situation. If it found that a natural monopoly situation existed, the jury was further instructed to determine whether defendants committed the offense of actual monopolization with respect to competition *for* the market. In other words, under this submission the jury was told to consider whether defendants violated the antitrust laws with respect to competition *for* the exclusive right to serve the Jefferson City market.[34]

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[33] According to the Court's research, this is the first case in which the question of whether a natural monopoly situation exists with respect to a cable television market has been submitted to a jury. *Cf. Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125-28; *Carlson v. Village of Union City*, 601 F. Supp. at 810 n. 8. The Court is convinced that treating the natural monopoly issue as a question of fact was proper; in each case, the issue will turn on a variety of particularized factors ranging from the population density of a given community to the age and height of its utility poles.

[34] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127.

This submission is not objectionable on First Amendment grounds. As noted above, a local governmental entity has the authority to select an exclusive franchisee when: (1) the local market has room for only one cable television system; and (2) the governing body makes its selection in the public interest.[35] If it proceeded under this branch of the "fork-in-the-road" instruction, the jury necessarily would have found that the Jefferson City market had room for only one cable system. Moreover, to ensure that the jury focused on "the public interest" as the standard by which the city awarded the franchise, the Court specifically instructed the jury that anti-competitive or predatory activity is conduct which operates to the detriment of purchasers or consumers. Thus, in order to return a plaintiff's verdict under this theory, the jury necessarily would have made two factual findings: (1) that the Jefferson City cable television market could only support one franchisee; and (2) that, in retaining their position as the sole franchisee in the Jefferson City market, defendants acted to the detriment of the interests of the consuming public. Given these two factual determinations, plaintiff's "natural monopoly" theory of the case easily withstands defendants' First Amendment attack.

(b) *Open Market Theory*

TCI's First Amendment assault on plaintiff's "open market" theory of the case is more difficult to analyze. Under the second branch of the "fork-in-the-road" instruction described above, the jury was permitted to find that the Jefferson City market had room for more than one cable television franchise. If it found that the market had room for more than one franchise, the jury was further instructed to determine whether defendants committed the offense of actual monopolization with respect to competition *in* the market. In other words, under this submission the jury was told to focus not on competition between rival cable television operators for a single franchise, but on head-to-head competition in the marketplace. This instruction effectively warned the jury that, notwithstand-

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[35] *See* notes 26-32 and accompanying text *supra*.

ing the city's intention to award only one franchise, it could not assume that only one franchise should have been awarded. At all times, it was within the province of the jury to determine whether the physical and economic characteristics of the Jefferson City market permitted head-to-head competition.

Defendants insist that plaintiff should not be allowed to recover under its "open market" theory for two reasons. First, defendants argue that, once the jury determined that Jefferson City had room for more than one cable system, the city's RFP process was illegal as a matter of law. Second, defendants contend that the evidence of plaintiff's unwillingness to compete head-to-head in the marketplace was so overwhelming as to preclude recovery under an "open market" theory.

Despite the superficial appeal of these two arguments, neither can withstand close scrutiny. It is true that TCI's publicly stated position in Jefferson City and at trial was that they were willing to compete head-to-head with any competitor. In accordance with this public posture, defendants characterized the city's RFP process as an illegal auction for an exclusive franchise and refused to participate in the RFP. In addition, defendants filed suit against the city in 1981, claiming that any attempt to revoke or terminate its right to provide cable television programming would be violative of the First Amendment. Thus, on the surface, defendants' contention that it was at all relevant times a scrupulous proponent, not an opponent, of open market competition appears to be true.

On closer inspection, however, it becomes apparent that the sincerity of TCI's publicly announced position was subject to legitimate dispute. At trial, there was evidence that defendants had taken a contrary position by defending a city's right to grant an exclusive franchise in other communities. In addition, notwithstanding defendants' criticism of plaintiff's efforts to obtain a *de facto* exclusive franchise from the city, there was substantial evidence that defendants were engaged in a calculated scheme to prevent plaintiff from entering the Jefferson City market and to maintain a *de facto* exclusive franchise for themselves.

Two factual findings implicit in the jury's verdicts confirm that TCI's endorsement of head-to-head competition lacked sincerity. First, the jury's finding that defendants possessed monopoly power — that is, the power to exclude competition in the Jefferson City market — contradicts TCI's argument that the city was solely responsible for deciding who could operate a cable system within that jurisdiction.[36] Second, the jury's finding that "defendants caused Jefferson City to terminate the business expectancy of plaintiff"[37] directly contradicts defendants' argument that they were not responsible for keeping plaintiff out of the Jefferson City cable television market. Undisputed evidence showed that, on April 20, 1982, the city council voted to grant an ostensibly nonexclusive franchise to plaintiff. If defendants were truly sincere about competing head-to-head with plaintiff in market, there was no need for them to cause the Mayor of Jefferson City to veto plaintiff's franchise. All that defendants needed to do was to press for a nonexclusive franchise of their own. Yet, the jury specifically found that TCI *caused* the city to withhold a franchise from plaintiff. Thus, even under an "open market" theory, there clearly was sufficient evidence to support the conclusion that defendants violated the antitrust laws by effectively barring plaintiff from the Jefferson City cable television market.

In sum, it was never necessary for the jury to frontally consider defendants' "First Amendment defense." If the jury had found that the city was solely responsible for artificially limiting the number of franchisees in the Jefferson City market, then *a fortiori* it would have found neither that defendants possessed monopoly power nor that defendants caused the city to veto plaintiff's franchise. Conversely, since the jury found

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[36] The verdict director on plaintiff's actual monopolization claim, Instruction No. 22, required as its second element that "defendants possessed or acquired monopoly power over the Jefferson City cable television services market." In turn, Instruction No. 18 defined "monopoly power" as "the power to exclude competition or control prices in the relevant product market or product sub-market."

[37] Instruction No. 23 (verdict director on plaintiff's tortious interference claim).

that defendants possessed monopoly power and that defendants caused the city to veto plaintiff's franchise, the Court is compelled to conclude that defendants' "First Amendment defense" is nothing more than a red herring. Simply stated, the jury could not have returned its verdict for plaintiff under an "open market" theory *unless it specifically found that defendants engaged in anti-competitive and predatory conduct with respect to competition in the market.* Defendants had every opportunity to produce evidence and make arguments to convince the jury that plaintiff's exclusion from the Jefferson City market was the result of either the city's efforts to artificially limit the number of franchisees or the plaintiff's unwillingness to compete head-to-head with defendants in the market. Defendants also enjoyed every opportunity to produce evidence and make arguments to persuade the jury that they were at all times in favor of head-to-head competition in the marketplace. If the jury had been swayed by any of these arguments, it would not have found against defendants. In short, the true issue in this case was whether defendants were responsible for plaintiff's exclusion from the Jefferson City market. The jury's conclusion that defendants were the responsible parties completely undermines any attempt to pass the blame on to the city by way of an amorphous "First Amendment defense" in this case.

III. MOTION FOR A NEW TRIAL

In support of its motion for a new trial, TCI asserts myriad grounds for setting aside the jury's verdict. Only seven of the cited grounds will be addressed herein. The balance of the points raised by TCI must be rejected as being without merit.

A. Opening Statement

First, defendants attack the Court's refusal to allow them to make legal arguments concerning the scope of a cable television operator's First Amendment rights during opening statement. On more than one occasion, TCI's attorney attempted to interject gratuitous and inaccurate legal arguments concerning the First Amendment in his opening remarks.

Prompt objections by plaintiff's counsel were sustained.[38] The Court's rulings are not subject to serious dispute. Opening statements afford the parties an opportunity to outline what their evidence will be. Legal arguments offered during the course of an opening statement are improper. Accordingly, the Court had no choice but to direct defendants' attorney to refrain from making references to principles of constitutional jurisprudence during his opening statement, particularly where, as here, his characterization of the law was either erroneous or misleading.

B. Evidentiary Rulings

TCI's second argument in support of its prayer for a new trial consists of a challenge to various evidentiary rulings by the Court. First, defendants contend that the Court erred in excluding evidence concerning the "*Boulder* case." The Court stands by this ruling. During his examination of a number of witnesses, TCI's attorney attempted to elicit testimony concerning the effect on the instant case of various rulings by the federal district court, the court of appeals, and the United States Supreme Court in the course of litigation between a subsidiary of TCI and the City of Boulder, Colorado.[39] In each instance,

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[38] Defendants also complain that, in the course of sustaining one of plaintiff's objections, the Court stated that the First Amendment had "nothing to do with this case." If taken literally, this remark would have been incorrect; as noted above, the First Amendment was involved in this case by virtue of the *Noerr-Pennington* defense and in connection with the natural monopoly question. *See* pages [42a-55a] *supra.* Put in context, however, the true meaning of the Court's remark, as everyone present in the courtroom—including defendants' attorneys—was aware, was that any reference to the First Amendment had no place in an opening statement. Moreover, as the trial progressed, TCI was afforded every opportunity to educate the jury with respect to both its *Noerr-Pennington* defense and its claim that it did not act as a monopolist but instead acted as a zealous defender of the First Amendment. Thus, any overstatement by the Court during defendants' opening statement clearly did not taint the jury's verdict.

[39] *See Community Communications Co. v. City of Boulder,* 485 F. Supp. 1035 (D. Colo. 1980), *rev'd,* 630 F.2d 704 (10th Cir. 1981), *rev'd,* 455 U.S. 40 (1982); *Community Communications Co. v. City of Boulder,* 496 F. Supp. 823 (D. Colo. 1980), *rev'd,* 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed,* 456 U.S. 1001 (1982).

defendants' attorney attempted to characterize the *Boulder* case as a landmark establishing an absolute First Amendment right for cable television systems to operate free from local governmental regulation. Upon timely objections by plaintiff's counsel, this evidence was excluded for two basic reasons. First, TCI's characterization of the *Boulder* case was deliberately misleading. Of the three appellate decisions in the *Boulder* litigation, only one[40] contained any substantive discussion of the First Amendment implications of local governmental cable regulations, and that opinion does not merit characterization as a landmark decision establishing an absolute First Amendment right to operate a cable television system.[41] Second, the Court was concerned that any probative value to be derived from evidence concerning the *Boulder* case was easily outweighed by the potential risk of misdirection and confusion such an inquiry would entail. For example, when defendants offered to introduce a certified copy of a consent decree entered into by the city and the cable operator in the *Boulder* case, this offer was rejected on the ground that the jury might well misperceive the importance of such a document and give it undue weight.

Another evidentiary ruling challenged by TCI is the Court's exclusion of the expert testimony of Arthur Lee. Mr. Lee is a Vice President of Operations for TCI. Because Mr. Lee was never designated as an expert in response to plaintiff's interrogatory under Fed.R.Civ.P. 26(b)(4)(A)(i), plaintiff assumed that he would be used by defendants as a lay witness only. In the course of examining Mr. Lee at trial, defendant's counsel began asking the witness about the pole attachment and pole replacement costs that would be involved in building a brand new cable television system in Jefferson City. Plaintiff's objection to this testimony was sustained on the ground that this was a subject for expert testimony and that Mr. Lee had not

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[40] *See* 660 F.2d at 1375-80.

[41] To the contrary, the Tenth Circuit overturned a preliminary injunction in favor of the cable operator and remanded the case to the district court, stating that the scope of the cable operator's First Amendment protection was a matter to be developed at trial. *Id.* at 1380.

been designated as an expert. TCI seeks to overturn this ruling by characterizing Mr. Lee as an occurrence witness who merely would have testified "as to his personal knowledge as a veteran in the cable field."[42] Defendants' argument misses the point. Under Fed. R. Evid. 702, a witness may qualify as an expert by virtue of his knowledge, experience, or training. The crucial distinction between lay testimony and expert testimony is that the subject of expert testimony "must be so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average layman."[43] Viewed in this context, it is readily apparent that Mr. Lee's proffered testimony was expert testimony. According to defendants, the proffered testimony would have dealt with "make-ready costs, pole brackets and utility pole spacing."[44] These topics clearly are beyond the understanding of an ordinary layman. Indeed, defendants contend that Mr. Lee was qualified to give his opinion "based on his extensive experience in the industry and on his knowledge acquired as an executive officer of TCI Cablevision."[45] This statement is, in effect, an admission by TCI that Mr. Lee's testimony concerned a technical subject which only an expert, and not a layman, would not [sic] be qualified to address. Therefore, it was proper to exclude Mr. Lee's testimony by reason of defendants' failure to designate him as an expert witness in response to plaintiff's interrogatory under Fed.R.Civ.P. 26(b)(4)(A)(i).

A third evidentiary ruling challenged by TCI which merits discussion relates to the testimony of TCI's expert economist, Mr. Roy Weinstein. Before Mr. Weinstein began testifying, plaintiff's counsel moved to exclude his testimony in its entirety on the ground that he had been reading "daily copy" of the

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[42] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 38.

[43] *McCormick's Handbook on the Law of Evidence* § 13, at 29 (2d ed. 1972).

[44] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 39.

[45] *Id.*

trial transcript in violation of Fed.R.Evid. 615. Mr. Weinstein acknowledged that he had been reading "daily copy." Although it would have been justified in excluding all of Mr. Weinstein's testimony under these circumstances,[46] the Court took a middle position and ruled that Mr. Weinstein could testify concerning any information he had obtained and opinions he had formed before, but not after, he had been deposed by plaintiff in September, 1984. Defendants insist that this ruling was an abuse of discretion. The Court disagrees. Mr. Weinstein's review of daily copy was a clear violation of Fed. R. Evid. 615. If TCI had wanted to qualify Mr. Weinstein as a person whose presence was essential to the presentation of its case within the meaning of the rule, it should have so moved when the rule was invoked at the start of trial. Moreover, the Court believes that its ruling was correct under Fed. R. Civ. P. 26(e)(1)(B), which imposes an affirmative duty on parties to supplement their interrogatory answers concerning the substance of anticipated expert witness testimony; it bears emphasis that Mr. Weinstein was precluded only from testifying with respect to matters of substance which had arisen subsequent to his deposition in September, 1984. Accordingly, the Court stands by this ruling.

The final evidentiary point to be addressed herein concerns the testimony of Clarence Blume. Mr. Blume, a member of the Jefferson City City Council in the crucial period of 1981-82, was called to testify by plaintiff. As a result of his testimony, the Court for the first time became aware of how deeply involved TCI's lead attorney, Mr. Harold Farrow, had been in TCI's efforts to retain its franchise in Jefferson City. During Mr. Farrow's cross-examination of Mr. Blume, the attorney and the witness began debating over exactly what had transpired in Jefferson City. When Mr. Blume directed questions at Mr. Farrow, the attorney did not offer any objection or motion to strike the witness' "testimony" as being non-responsive. Instead, much to the Court's astonishment, Mr. Farrow appeared

[46] *See Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372-74 (5th Cir. 1981).

content to answer Mr. Blume's questions. At times, the witness and the attorney began arguing back and forth. On one occasion, the situation had deteriorated to the point where the Court intervened *sua sponte* and directed Mr. Blume to just answer the questions asked. All the while, Mr. Farrow did not object to nor move to strike Mr. Blume's testimony; it was obvious that Mr. Farrow believed he was "scoring points" with the jury. The following day — after having had an opportunity to confer with his associates and read the "daily copy" of the trial transcript — Mr. Farrow finally offered a motion to strike Mr. Blume's testimony in its entirety. This motion was denied as being untimely. Under Fed.R.Evid. 103(a)(1), a party ordinarily may not challenge a ruling admitting evidence unless he has made a timely motion to strike on the record. It bears emphasis that Mr. Farrow is not a novice attorney who was simply overwhelmed by a hostile witness; instead, it was quite evident that Mr. Farrow refrained from objecting to Mr. Blume's testimony because he perceived that he was creating a favorable impression in the minds of the jurors. In addition, the Court notes that the vast majority of Mr. Blume's testimony was not inadmissible in the first instance; thus, TCI's motion to strike *all* of the witness' testimony was overbroad. Under these circumstances, the Court is unwilling to set aside the contemporaneous objection rule. Accordingly, the Court stands by its decision to overrule defendants' motion to strike Mr. Blume's testimony.

C. Directed Verdict on Defendants' Counterclaim

Defendants' next argument in support of their request for a new trial is that the Court erred in granting plaintiff's motion for a directed verdict on defendants' counterclaims. TCI's position on this issue clearly lacks merit. At trial, defendants attempted to make a submissible case against plaintiff on the following theories: (1) conspiracy to unreasonably restrain trade; (2) attempt to monopolize; (3) conspiracy to violate TCI's constitutional rights; and (4) tortious interference with TCI's business relations. In attempting to prove their allegation of a secret conspiracy between plaintiff and a host of state and

local politicians, TCI repeatedly posed questions to the politician-witnesses to the effect of: "Isn't it true that you had a secret arrangement with plaintiff to drive TCI out of Jefferson City?" Without exception, TCI's pointed accusations were calmly denied. In short, there was absolutely no evidence of any kind of unholy arrangement between plaintiff and governmental officials. To the contrary, the evidence consistently showed that plaintiff at all times remained within legitimate lobbying channels in seeking a cable television franchise. After all of the evidence was in, it became apparent that the gravamen of TCI's counterclaims was that the RFP process initiated by the city was illegal and that plaintiff had somehow violated TCI's rights by participating in the RFP process. Assuming *arguendo*[47] that the RFP process was in fact illegal and that plaintiff did in fact violate defendants' rights by participating in the RFP process, plaintiff still could not be held liable for its conduct because of the *Noerr-Pennington* defense. As noted above,[48] the *Noerr-Pennington* doctrine affords a cloak of immunity from civil damages liability to legitimate efforts to lobby or influence public officials with respect to political action, even if those efforts are designed to eliminate competition. Here, all of plaintiff's allegedly wrongful conduct clearly falls within the purview of the *Noerr-Pennington* defense;[49] accordingly, it was proper to grant plaintiff's motion for a directed verdict on all of TCI's counterclaims.[50]

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[47] *Cf.* pages [45a-51a] *supra.*

[48] *See* page [44a] *supra.*

[49] *See Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. at 546-47; *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975); *see also First Am. Title Co. of S. Dakota v. South Dakota Land Title Ass'n*, 714 F.2d at 1445-47; *City of Kirkwood v. Union Electric Co.*, 671 F.2d at 1180-81; *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d at 293-297.

[50] As noted above, *see* note 7 *supra*, the *Noerr-Pennington* defense is applicable to many types of claims even though it is most commonly associated with antitrust claims. In particular, the *Noerr-Pennington* defense is available with respect to the types of claims asserted by TCI. *See Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (*Noerr-Pennington* doctrine applicable to § 1983 claims); *First National Bank of Omaha v. Marquette National Bank*, 482 F. Supp. at 521, 524-25 (*Noerr-Pennington* doctrine applicable to § 1983 and tortious interference claims).

D. Closing Argument

Defendants' fourth assignment of error in their motion for a new trial is that the Court did not allow their attorneys sufficient time to make a proper closing argument. At the close of all the evidence the Court conferred with the attorneys concerning the amount of time they desired to make their final appeal to the jury. Although the Court was inclined to allow only an hour per side, it acceded to plaintiff's request for ninety minutes per side. Counsel for TCI objected that this amount of time was grossly inadequate in view of the length and complexity of the trial. TCI's request for additional time was overruled. The Court stands by this ruling. There is no doubt but that ninety minutes was adequate time for each side to present its case to the jury. Although this trial was lengthy, it was not particularly complex. The fundamental issues for the jury were whether TCI kept plaintiff out of the Jefferson City cable television market and, if so, whether TCI accomplished that result by using illegitimate means. Unlike many antitrust cases, the instant lawsuit did not turn on technical documentary evidence and expert evidence; instead, the crucial evidence concerned overt conduct. Thus, it was not necessary to allow counsel a great amount of time to make the case understandable for the jury.

Moreover, the Court notes that counsel for TCI was not particularly pressed for time during closing argument. Indeed, there was sufficient time for TCI's attorneys to tell the jury on numerous occasions how little time had been allowed for closing arguments and to extol the virtues of the Sixth [sic] Amendment right to a jury trial in civil cases. There also was sufficient time for TCI's attorneys to describe at great length how their client had been "hometowned" by plaintiff notwithstanding the fact that there was virtually no evidence to support this contention.[51] Under these circumstances, the Court concludes that the amount of time allocated for closing arguments was more than adequate.

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[51] *See* pages [60a-61a] *supra*.

E. Jury Instructions

Defendants' fifth argument in favor of a new trial is that several of the jury instructions submitted by the Court were in error. Only four of TCI's challenges to the jury instructions will be addressed herein; the remainder must be rejected as lacking merit.

First, TCI insists that the Court's *Noerr-Pennington* instruction[52] failed to set out the precise scope of that defense. The Court disagrees. The instruction was based directly on *Westborough Mall v. City of Cape Girardeau*, where the Eighth Circuit explained that "actions beyond 'traditional political activity' may not be protected by the *Noerr* exemption," particularly if the defendants' lobbying efforts were "accompanied by illegal or fraudulent actions."[53]

TCI next challenges the verdict director for plaintiff's state law tortious interference claim,[54] asserting that the Court's instruction did not adequately define the elements of the tort. This argument is wholly without merit. The instruction given by the Court was based directly on a pattern instruction[55] which has been approved by the Missouri Supreme Court Committee on Jury Instructions. The use of this instruction has been mandatory in the state court system for years. It is beyond the Court's comprehension how the use of a pattern jury instruction, which *must* be used in state court, can constitute reversible error with respect to plaintiff's state law claim.

Similarly, defendants' challenge to the Court's burden of proof instruction[56] must be rejected. Here again, the Court used the pattern burden of proof instruction which has been

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[52] Instruction No. 14.

[53] 693 F.2d at 746.

[54] Instruction No. 23.

[55] Mo. Approved Instr. 23.11 [1981 Revision]. The Court's only modification of the pattern instruction was the inclusion of an additional element—"Second, defendants knew of the business expectancy of plaintiff"—upon the request of TCI.

[56] Instruction No. 4.

approved for use in the state court system.[57] This burden of proof instruction is clear and concise. Its use did not constitute error.

Finally, defendants contend that the Court's instruction on natural monopoly[58] theory was erroneous as a matter of law. Specifically, defendants insist that "[t]he concept that the Sherman Act protects competition for the right to enjoy a natural monopoly is wholly without support in the law."[59] The Court must disagree. Contrary to TCI's characterization, the notion that the antitrust laws protect competition "for" the market in a natural monopoly situation enjoys ample support in the law.[60] Moreover, the Court's instruction correctly stated the law in this area. Accordingly, defendants' objections to the Court's jury instructions will be overruled.

F. Judicial Bias

Defendants' sixth ground for a new trial is an allegation that they "were denied a fair trial in this case due to the

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[57] Mo. Approved Instr. 3.01 [1981 Revision].

[58] Instruction No. 20. In the challenged portion of this instruction, the jury was told:

> ". . . In a natural monopoly situation, competition in the market is not economically feasible; consequently, in a natural monopoly situation, the purpose of antitrust laws is to protect competition for the right to serve the market. . . . Keep in mind that the purpose of the antitrust laws ordinarily is to protect competition in the market; however, if a market has room for only one firm, the antitrust laws are designed to protect competition for the right to enjoy that natural monopoly position."

[59] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 50.

[60] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127 ("the antitrust laws protect competition not only in, but for, the market—that is, competition to be the firm to enjoy a natural monopoly . . . and by a modest extension competition to replace the existing natural monopolist") (citation omitted); *see e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 369-70 (1973); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659-661 (1964); *Continental Cablevision v. American Elec. Power Co.*, 715 F.2d 1115, 1120-21 (6th Cir. 1983); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d at 745 n. 7.

partiality and bias of the Court in favor of plaintiff and against defendants."[61] TCI specifically contends that the Court's "consistently pro-plaintiff rulings" conveyed the Court's bias to the jury and thus tainted the jury's verdict.[62] The short answer to defendants' accusations is that the Court simply was not biased in favor of plaintiff and against defendants. Instead, the Court made every effort to give this cause a fair and impartial hearing and to manifest its sense of impartiality from the bench. Moreover, to the extent that any comments made by the Court suggested its view of the evidence, the jurors were expressly instructed to "disregard all comments of the Court in arriving at [their] own findings as to the facts."[63]

The longer answer to defendants' charge of bias is this: the rulings which were allegedly the result of the Court's partiality were in fact the result of the incompetence of defendants' trial attorneys. For example, TCI claims that the following rulings were motivated by judicial bias: (1) the exclusion of Mr. Lee's expert testimony; (2) the limitation on Mr. Weinstein's expert testimony; and (3) the refusal to strike the testimony of Clarence Blume. As explained above,[64] however, each of these rulings was in fact necessitated by defense counsel's insistence on ignoring simple rules of evidence and procedure. In the case of Mr. Lee, the exclusion of his testimony was required because of counsel's failure to designate him as an expert witness in response to plaintiff's interrogatories. With respect to Mr. Weinstein's testimony, the Court's ruling was based on counsel's failure to supplement interrogatory answers and failure to abide by Fed. R. Evid. 615. Finally, concerning Clarence Blume, the Court's denial of defendants' motion to strike was based on counsel's failure to heed the contemporaneous objection rule. In sum, the Court simply was not biased in ruling on any of the issues in this case; TCI's assertion to the contrary is unfounded.

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[61] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 28.

[62] *Id.* at 29-32.

[63] Instruction No. 3.

[64] *See* pages [57a-60a] supra.

Similarly, the Court's comments during trial, which were allegedly motivated by bias, were in fact attributable to the discourteous and belligerent manner in which defendants' trial attorneys conducted themselves. On numerous occasions, defense counsel responded to unfavorable evidentiary rulings by muttering to themselves, rolling their eyes, and hurling pens and legal pads at the counsel table with great force. All of these childish antics were performed openly in the presence of the jury, as if defense counsel was attempting to communicate to the jury that their client was being "railroaded" by virtue of the Court's adverse evidentiary rulings. In order to maintain control over the conduct of this trial, the Court admittedly was required to reprimand defense counsel from time to time. Nevertheless, the Court is certain that none of its comments, whether or not made in the presence of the jury, was unwarranted.[65] Consequently, the Court is compelled to hold that defendants' allegations of judicial bias are without basis in fact.

G. Juror Misconduct

The seventh and final point in defendants' motion for a new trial which will be addressed herein is an allegation that there was improper contact between one of plaintiff's attorneys, Mr. Long, and a member of the jury, Ms. Shern, and that this contact may have tainted the jury's verdict. There are two short answers to TCI's argument. First, there is no indication that the

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[65] For example, after excusing the jury and overruling defendants' motion to strike the testimony of Clarence Blume, the Court felt compelled to reprimand attorney Farrow for representing TCI in this lawsuit in the first instance. The dialogue between Mr. Blume and Mr. Farrow made it quite clear that Mr. Farrow was so intimately involved in the events leading up to this litigation that he should have appeared as a witness, not as an attorney. Disciplinary Rule 5-101(B) of the ABA Code of Professional Responsibility expressly provides that a lawyer should refuse employment in a contemplated or pending lawsuit if he knows that he ought to be called as a witness. Undoubtedly, defense counsel believed that the reprimand of Mr. Farrow was merely a manifestation of the Court's hostility. In reality, however, the Court issued the reprimand to Mr. Farrow and a warning that his conduct might result in a malpractice action because this Court fully expects all attorneys practicing before it to live up to acceptable standards of professional ethics.

alleged contact between attorney Long and juror Shern related to the merits of this case. Thus, in sharp contrast to the case upon which TCI relies,[66] there is no basis for concluding that any improper communications related to merits of the case.[67] Second, the Court notes that Ms. Shern was an alternate juror who did not participate in the jury's deliberations. On each day of the trial, the jurors were instructed not to discuss the case with each other. Thus, even assuming that juror Shern was tainted by virtue of her alleged contact with attorney Long, there is nothing which suggests that this taint spread to the other jurors who actually deliberated over this case. In conclusion, TCI's bare allegation of prejudicial juror misconduct has no support in the record. Accordingly, defendants' motion for a new trial must be overruled.

IV. MOTION FOR CLARIFICATION OF THE JUDGMENT

The next item on the Court's post-trial agenda is modification of the judgment in this case to reflect the fact that the damage awards under each of plaintiff's claims are alternative, not cumulative. Both plaintiff and defendants are in agreement that plaintiff may recover *either* treble damages of $32.4 million plus a reasonable attorney's fee under plaintiff's antitrust conspiracy claim *or* treble damages of $32.4 million plus a reasonable attorney's fee under plaintiff's actual monopolization claim *or* actual and punitive damages totalling $35.8 million under plaintiff's tortious interference claim. The parties further agree that plaintiff may not recover punitive damages under the state law claim in addition to treble damages under the antitrust laws. The Court concurs. Treble damages are

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[66] *Mattox v. United States*, 146 U.S. 140 (1892).

[67] TCI also purports to rely on *California Fruit Exchange v. Henry*, 89 F. Supp. 580 (W.D. Pa. 1950). In *Henry*, however, the district court ultimately refused to grant a new trial after noting that "[a] new trial should not be granted because of irregularities in the conduct of a juror or counsel unless it is made to appear that the alleged misconduct was prejudicial to one of the party litigants." *Id.* at 589. This Court concurs in the reasoning and result set forth in the *Henry* opinion.

designed "to punish past violations of the antitrust laws . . . [and] to deter future antitrust violations."[68] Punitive damages have a similar purpose.[69] Accordingly, it would be inappropriate to allow plaintiff to recover both treble damages and punitive damages.[70] The judgment in this case will be modified to account for this fact.

V. MOTION FOR ENHANCEMENT OF PLAINTIFF'S ATTORNEY'S FEES

The penultimate question before the Court concerns plaintiff's motion for enhancement of its attorney's fees. As noted above, plaintiff is entitled to an award of a reasonable attorney's fee by virtue of its success on its antitrust claims.[71] As a result of negotiation, plaintiff and defendants have entered into a stipulation as to the amount of attorney's fees and expenses incurred herein. The only issue remaining for the Court is whether plaintiff is entitled to any enhancement of the attorney's fee award. Plaintiff seeks a three-fold increase in the amount of its attorney's fees.

In support of enhancement, plaintiff offers a three-part argument. First, plaintiff contends that enhancement is appropriate because of the risk involved in pursuing this case. Second, plaintiff maintains that enhancement is warranted in view of the uniformly favorable results obtained. Third, plaintiff asserts that enhancement is justified because of the high quality of representation rendered by plaintiff's attorneys.

The Court is inclined to agree that the risks involved in initiating this litigation were substantial and that the professional services rendered by plaintiff's attorneys were, for the most part, of a high quality. Nevertheless, the Court will

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[68] *American Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 102 S.Ct. 1935, 1947 (1982).

[69] *See* Mo. Approved Instr. 10.01 [1983 Revision].

[70] *See McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1381 (8th Cir. 1983); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1283-84 (8th Cir. 1981); *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. 1979).

[71] *See* 15 U.S.C. § 15.

decline to enhance plaintiff's attorney's fees. It bears emphasis that the moving party must meet a "heavy burden" to establish its entitlement to fee enhancement.[72] It also should be noted that fee enhancement is warranted only in an exceptional case.[73]

Turning to the instant case, the Court notes that plaintiff and its attorneys have already been rewarded handsomely for undertaking this litigation. Although plaintiff and its attorneys admittedly undertook a substantial risk by bringing this lawsuit, they knew that a favorable verdict almost certainly would be accompanied by a damage award of approximately $10 million. Thus, whoever took the risk of financing this lawsuit apparently had calculated that the potential payoff justified the initial investment.[74]

Finally, the Court notes that the quality of representation factor has already been accounted for in calculating the base attorney's fee. The keystone of good lawyering is preparation. Here, the generally high quality of representation afforded by plaintiff's counsel is directly attributable to thorough preparation which, in turn, is directly reflected in the number of hours that went into the calculation of the base fee. Consequently, in the absence of any truly exceptional circumstances, the Court will overrule plaintiff's motion for enhancement of its attorney's fees.

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[72] *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1276 (8th Cir. 1980); *see also Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1314 (8th Cir. 1981).

[73] *See Blum v. Stenson*, 104 S. Ct. 1541, 1548-50 (1984).

[74] It is irrelevant whether plaintiff or plaintiff's attorneys assumed the risk of financing this case. If the attorneys were working on a straight hourly fee, plaintiff knew that it would receive the entire judgment in the event of a favorable verdict. On the other hand, if the attorneys took this case on a contingent fee, they assumed the risk of investing their time in this case for a chance at sharing in a multimillion dollar judgment. In short, there was no lack of incentive for the people who financed this case. *Cf. Blum v. Stenson*, 104 S.Ct. at 1548 (a reasonable fee must be sufficient to attract competent counsel but should not be a windfall).

VI. MOTION FOR A STAY OF EXECUTION

The final matter before the Court is defendants' motion to stay execution on the judgment herein pending appeal. In support of its motion, defendants contend that their fiscal integrity[75] is sufficient assurance that plaintiff can eventually collect on the judgment. Defendants further submit that it would be a tremendous hardship if they were forced to post a supersedeas bond to cover the amount of the judgment in this case.[76] Be that as it may, the Court does not agree that the sheer size of defendants is sufficient security for the judgment herein. Under ordinary circumstances, a supersedeas bond is required to protect a prevailing plaintiff.[77] Indeed, the purpose of a supersedeas bond is to preserve the status quo while protecting the prevailing plaintiff. In the instant case, however, defendants seek to preserve the status quo without providing any security to plaintiff other than TCI's word. Although the Court does not doubt TCI's integrity, it does not believe that plaintiff should be required to bear any risk pending appeal. The jury heard the evidence in this case and rendered large, though not excessive, damage awards. If one party should endure any inconvenience in order to maintain the status quo, it should be TCI. Consequently, defendants' motion for a stay of execution pending appeal will be overruled.

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[75] According to the affidavit of D.F. Fisher, Treasurer of TCI, shareholder equity in the corporation totalled $223,178,000.00 as of September 30, 1984.

[76] Affiant Fisher stated:

"Supersedeas bonds are rarely written in amounts as large as comtemplated [sic] in this case. Numerous underwriters have been contacted without success."

[77] *See* Fed.R.Civ.P. 62(d).

VII. CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion for judgment notwithstanding the verdict and alternative motion for a new trial are overruled. It is further

ORDERED that defendants' motion for clarification of the judgment is sustained and the judgment herein is modified to provide that plaintiff may recover treble damages under either of its antitrust claims or actual and punitive damages under its tortious interference claim, but may not recover damages under more than one claim. It is further

ORDERED that, pursuant to the stipulation entered into by the parties, plaintiff's motion for attorney's fees and expenses on plaintiff's antitrust claims, in the amount of $1,311,104.00, is sustained. It is further

ORDERED that plaintiff's motion for enhancement of its attorney's fees is overruled. It is further

ORDERED that defendants' motion for a stay of execution is overruled.

/s/ SCOTT O. WRIGHT

SCOTT O. WRIGHT
United States District Judge

Date: June 5, 1985

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CENTRAL TELECOMMUNICATIONS, INC.,
Plaintiff,

vs.

CITY OF JEFFERSON CITY, MISSOURI,
and TCI Cablevision, Inc.,
Defendants.

No. 83-4068-CV-C-5

[FILE STAMP]

ORDER

I. INTRODUCTION

Plaintiff, Central Communications, Inc. (Central), has filed a fourteen-count complaint asserting anti-trust, constitutional and common law claims against the City of Jefferson City and TCI Cablevision, Inc. (TCI). The defendants have filed motions to dismiss which are pending before the Court.

In support of its claims, Central alleges that since 1978 defendant TCI has been the sole operator of a cable television system within the city limits of Jefferson City. TCI has conducted its cable television system pursuant to a "license" or "franchise" granted through city ordinances. In late 1980, the City began studying and thereafter adopted on December 15, 1980, a bid procedure by which the new franchise (to be effective April 1, 1981) could be awarded. The City initiated

this process by sending a "Request for Proposals for Cable Television Service" (RFP) to numerous cable television companies, including defendant TCI.

The City's bid process mandated that all bids were to be based entirely upon the RFP specifications and that said bids, once received by the City, were to be evaluated by an independent consulting agency in Dallas, Texas.

The plaintiff alleges that during the time that bids were being considered by the City, TCI illegally contacted and threatened the consultant retained by the City, threatened to cut off cable television service to the City, withheld franchise payments from the City, instituted sham litigation against the City, met illegally with City officials, and threatened other cable company bidders.

Plaintiff further alleges that on January 25, 1982, the City Council voted on two bills and selected the plaintiff's bid. It is alleged that they further authorized and directed the City Attorney to negotiate with plaintiff in order to prepare the necessary franchise documents, including two ordinances, a regulatory ordinance and a franchise award ordinance.

The plaintiff further alleges that the City Attorney conducted secret negotiations with the defendant TCI while representing to the plaintiff that it would be awarded the franchise.

On April 20, 1982, the Council voted 7-3 in favor of awarding the franchise to plaintiff Central. The plaintiff alleges that Mayor Hartsfield, acting pursuant to an agreement and in concert with TCI, the City Attorney and others, vetoed the Council's franchise award to Central. On the same date and after the Mayor's veto, ordinances were presented to the Council awarding the franchise to the defendant TCI. The Council voted 5-5 on these ordinances and they were passed by the deciding vote of the Mayor.

Plaintiff alleges that Mayor Hartsfield's veto and subsequent votes were in violation of state law prohibiting such action by the Mayor where he has a conflict of interest. The

plaintiff further alleges that the Mayor had a conflict of interest because he worked for a telephone company from whom the defendant TCI rented space.

Mayor Hartsfield's veto and subsequent votes were allegedly cast pursuant to an agreement with TCI, City Attorney Utterback and others not yet known by the plaintiff to award the franchise to TCI despite its having not presented a bid which complied with the RFP procedure.

II. MOTIONS TO DISMISS

A. *Anti-trust Claims*

1. *Parker* exemption

The City asserts that it is immune from liability because its actions were authorized by the State of Missouri. Federal anti-trust laws do not prohibit a state from exercising its sovereign powers to impose certain anti-competitive restraints. The Supreme Court first addressed the conflict between federal anti-trust law and state sovereign power in *Parker v. Brown,* 317 U.S. 341 (1943). The Court stated:

> We find nothing in the language of the Sherman Act or in its history which suggest that its purpose was to restrain a state or its officers or agents from activity directed by its legislature. In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51. A municipality is not itself sovereign and, accordingly, is entitled to the *Parker* exemption "only to the extent that [it] acted pursuant to a clearly articulated and affirmatively expressed state policy." *Community Communications Co. v. City of Boulder,* ___ U.S. ___, ___, 102 S.Ct. 835,

842 (1982), *citing, City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978). A two-prong test must be satisfied to establish a state policy sufficient to confer *Parker* immunity upon a municipality. "The legislature must have authorized the challenged activity, *and* it must have done so with an intent to displace competition." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1011 (8th Cir. 1983) (citations omitted) (emphasis added). "[A] sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Id.* at 1012-13. (citations omitted).

The City of Jefferson City asserts that the first element of the two-prong *Parker* immunity test has been met in this case. The City asserts that the challenged activity in this case is the regulation and control of cable television businesses and that such activity has specifically been authorized by the Missouri legislature.[1] The plaintiff, however, asserts that the challenged

[1] The Missouri legislature has expressly authorized the City to regulate telephone poles and excavations in and under its streets and rights of way. Mo. Rev. Stat. § 77.520 (1978). The Missouri Supreme Court has determined that municipalities have an "indispensible duty" to control the use of their streets. *Planned Industrial Expansion Authority v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772, 776 (Mo. en banc 1981). In light of this traditional duty to regulate, the Missouri Supreme Court has held:

> The rule must be considered settled, that no person can acquire a right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power . . . . The power to grant franchises resides in the state, and a city, in granting a franchise, acts as agent for the state.

Shartel ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 397 (en banc 1932). In *Cablevision Inc. v. City of Sedalia*, 518 S.W.2d 48 (1974), the Missouri Supreme Court held inherent within a municipality's "broad power of control over the streets" is the power to regulate cable television. *Id.* at 52. Before a cable company could operate in a city, "some sort of grant from the city would be necessary, inasmuch as the installation of the operation of the system would involve the use of the city streets." *Id.* A city not only has the right to grant a cable company the privilege to use its streets but, according to the Missouri Supreme Court, it can reserve in its franchise grant the right to approve the rates set by cable companies. *Id.* at 54.

activity in this case is an alleged conspiracy between certain City officials and defendant TCI.

The plaintiff in this action has alleged a conspiracy between certain City officials and defendant TCI to restrain and monopolize trade. Plaintiff alleges that on April 20, 1982, the City Council voted in favor of awarding a franchise to the plaintiff to deliver cable television to the City of Jefferson City. Plaintiff further alleges that the Mayor then vetoed the franchise award. The veto, plaintiff alleges, was a result of a conspiracy with defendant TCI and was in violation of state law because the Mayor had a conflict of interest which prohibited him from participating in the bid procedure. The Mayor allegedly was employed at the local telephone company, from whom defendant TCI rented space for its cable. Because of the foregoing allegations, plaintiff alleges that the defendant City is unentitled to *Parker* immunity.

In *Westborough Mall v. City of Cape Girardeau, Missouri,* 693 F.2d 733 (8th Cir. 1982), the Eighth Circuit ruled that *Parker* immunity did not, as a matter of law, exempt the city from liability where the plaintiff alleges an illegal conspiracy. *Id.* at 746.

In *Westborough Mall* the plaintiffs alleged "a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property. *Id.* at 746. Such action, the Court held, was not ". . . in furtherance of any clearly articulated state policy." *Id.* Thus, plaintiff Central asserts that the *Parker* immunity is unavailable to the City in this case because a conspiracy to circumvent competitive bid procedures, to interfere with plaintiff's prospective business relationships, and to deprive the plaintiff of a franchise is not in furtherance of any clearly articulated state policy. Essentially, plaintiff asserts that these acts exceed the scope of activities contemplated by the Missouri legislature. Well-pleaded material allegations are deemed admitted for purposes of determining whether a cause of action has been stated; thus, plaintiff's complaint against the City cannot be dismissed at this point because of *Parker* immunity.

2. *Noerr-Pennington Doctrine*

The defendants assert that plaintiff's anti-trust claims are barred by the *Noerr-Pennington* doctrine. "The *Noerr-Pennington* doctrine exempts from the anti-trust laws lobbying and other joint efforts by private individuals to obtain legislative or executive action." *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 745 (8th Cir. 1982) (citation omitted). The plaintiff has alleged that defendant TCI engaged in unlawful conduct and employed illegal means to influence the City, thus the *Noerr-Pennington* doctrine may not be relied on to exempt the defendants from anti-trust liability at this state of the proceedings. *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 745-46 (8th Cir. 1982).

3. *Tenth Amendment*

The City asserts that the Tenth Amendment mandates rejection of the plaintiff's anti-trust claims. The Tenth Amendment bars the operation of any federal enactments that "directly displace the States' freedom to structure integral operations in the areas of traditional government functions . . . ." *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), the Supreme Court set forth the following test to be used in determining if the Tenth Amendment has been violated by the challenged federal statute:

> First, there must be a showing that the challenged statute regulates the "States as States." (citations omitted). Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." (citations omitted). And third, it must be apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Id. at 287-88. Without deciding the first or second prerequisite for invoking Tenth Amendment protection, it is not clear at the

pleading stage that compliance with the antitrust laws in this case would directly impair the ability of the City of Jefferson City to structure integral operations in areas of traditional governmental functions. Thus, the motion to dismiss based on Tenth Amendment grounds must be denied.

4. *"Single Trader" Defense*

The City of Jefferson City asserts that it is protected from anti-trust liability on plaintiff's conspiracy claims by the *Colgate* doctrine. The Supreme Court in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), stated that the *Colgate* doctrine meant

> . . . no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

Id. at 43. Thus, the *Colgate* doctrine allows manufacturers to set suggested retail prices and to refuse to sell to retailers who do not abide by those suggested prices. The doctrine is inapplicable in the instant case. The plaintiff has alleged a conspiracy between the City and a competitor to exclude the plaintiff from the cable television market in the City of Jefferson City. A city does not have, by virtue of the *Colgate* doctrine, an absolute right to determine which businesses can compete within its environs. The dismissal of the complaint on the basis of the *Colgate* doctrine is denied.

5. *Substantive Allegations*

The defendants assert that plaintiff has failed to state a cause of action for violation of the anti-trust laws. It is well-

settled that in determining whether a complaint states a cognizable claim, the complaint must be construed in the light most favorable to the plaintiff, and it should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As the Supreme Court noted in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), it is not the function of the reviewing court to assess the merits of a particular claim when ruling on a motion to dismiss but, rather, to determine whether the plaintiff may introduce evidence to support his claim. Thus, although it may ultimately develop that the plaintiff is not entitled to recover on its anti-trust claims, it would be premature to rule that the plaintiff cannot properly establish any facts which would meet the legal requirements necessary to recover under the anti-trust laws.

The scope of a court's inquiry on a Rule 12(b)(6) motion is limited to the pleadings. However unlikely it may be that the plaintiff can support its allegations, the Court cannot dismiss the complaint for failure to state a cause of action. Nor would it be appropriate for the Court to treat the motion to dismiss as a motion for summary judgment pursuant to F.R.Civ.P. 12(b). Before a motion to dismiss which contains extra-pleading material can be treated by the Court as a motion for summary judgment, all parties must be given a reasonable opportunity to present pertinent evidence. In this case, the extra-pleading matters asserted by the defendants may more efficiently and appropriately be considered in a motion for summary judgment.

B. *Constitutional Claims*

Plaintiff in Count Eleven asserts that the City and TCI conspired to deprive plaintiff of its legally-protected rights, contrary to 42 U.S.C. § 1985(3). Section 1985(3) requires that there be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

Plaintiff has not alleged that an "invidiously discriminatory animus" was behind the defendants' alleged conspiracy. Plaintiff asserts in response to the motion to dismiss that the defendants sought to prevent the award of a franchise to any company other than TCI, thus discriminating against a class comprised of businesses competing for the Jefferson City cable television market. Section 1985(3) does not ". . . reach conspiracies motivated by economic or commercial animus." *United Brotherhood of Carpenters & Joiners v. Scott*, — U.S. —, —, 103 S. Ct. 3352, 3360 (1983). A class comprised of cable television companies is insufficient to support a cause of action for violation of § 1985(3). *See McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 928 (5th Cir. 1977) (discussion of artfully contrived classes found to be unprotected by § 1985(3)). The plaintiff has not stated a cause of action under 1985(3).

Plaintiff's other allegations of constitutional violations are sufficient and the motion to dismiss as to these violations will be overruled.

C. *Common Law Claims*

1. *Sovereign Immunity*

The City asserts that it is immune from plaintiff's common law tort claims by virtue of the doctrine of sovereign immunity. While municipalities are not liable for torts occurring during the performance of governmental functions, they are liable for torts arising out of a proprietary function. *Davis v. City of St. Louis*, 612 S.W.2d 812, 814 (Mo.App.E.D. 1981). "Through use of the 'governmental-proprietary dichotomy,' liability or non-liability of a municipality for its torts has come to depend upon the character of the act performed, not the nature of the tort." *Id.* (citation omitted). An act performed for the common good of all is a governmental act, while an act performed for the benefit or profit of the municipality as a corporate entity is a proprietary act. *Id.* A regulation beyond the mere right to use

a street has been held by the Missouri Supreme Court to be a proprietary function. *State v. Light & Development Co.*, 246 Mo. 618, 152 S.W. 67, 75 (1912). The regulation by the City of the cable television business is a proprietary function and sovereign immunity does not apply.

2. *Substantive Allegations*

Plaintiff has alleged both tortious interference with a legitimate business expectancy and intentional interference with prospective contractual relations. These claims are redundant. The Missouri Supreme Court has declared that "reasonable expectancies of commercial relations" are protected from tortious interference. *Fisher, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 315 (Mo. En banc 1970) (citing *Downey v. United Weatherproofing, Inc.*, 363 Mo. 852, 858, 253 S.W.2d 976, 980 (1953)). Plaintiff has stated a cause of action for tortious interference in Count Twelve; Count Fourteen, therefore, is dismissed as redundant. The claim set forth in Count Fourteen for tortious interference with prospective contractual relations is simply a restatement of the claim set forth in Count Twelve for tortious interference with a business expectancy.

In accordance with the foregoing, it is hereby

ORDERED that Counts Eleven and Fourteen are dismissed. It is further

ORDERED that the plaintiff respond within twenty (20) days to the pending motion for summary judgment filed by defendant TCI.

/s/ SCOTT O. WRIGHT

SCOTT O. WRIGHT
District Judge

Date: February 29, 1984

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT [FILE STAMP]

No. 85-1805WM

CENTRAL TELECOMMUNICATIONS, INC.,
Appellee,
v.
TCI CABLEVISION, INC., *et al.*,
Appellants.

Appeal from the United States District Court for the Western District of Missouri.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgement of the district court in this cause be affirmed in accordance with the opinion of this Court.

August 26, 1986

A true copy.

ATTEST: /S/ ROBERT D. ST. VRAIN
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1805-WM

CENTRAL TELECOMMUNICATIONS, INC.,

Appellee,

v.

TCI CABLEVISION, INC., *et al.,*

Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Appelants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 16, 1986

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* v. TCI CABLEVISION, INC., *et al.,* *Defendants.*	83-4068-CV-C-5 Chief Judge SCOTT O. WRIGHT

JUDGMENT IN A CIVIL CASE

This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

On the claim of plaintiff for a combination or conspiracy in restraint of trade, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

On the claim of plaintiff for actual monopolization, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at $10,800,000.00.

On the claim of plaintiff for tortious interference, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at $10,800,000.00.

The jury unanimously assesses punitive damages against the defendants under Instruction No. 25 at $25,000,000.00.

[FILE STAMP]

Entered on January 25, 1985

CLERK
R. F. CONNOR
(BY) DEPUTY CLERK
/S/ SUE E. STAHL

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* v. TCI CABLEVISION, INC., *et al.,* *Defendants.*	[FILE STAMP] Civil Action No. 83-4068-CV-C-5

JUDGMENT IN CIVIL CASE

This action came before the Court and a jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

On the claim of plaintiff for a combination or conspiracy in restraint of trade, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

On the claim of plaintiff for actual monopolization, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at Ten Million Eight Hundred Thousand ($10,800,000) Dollars, trebled by the Court to Thirty-Two Million Four Hundred Thousand ($32,400,000) Dollars plus costs and a reasonable attorney's fee.

On the claim of plaintiff for tortious interference, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at Ten Million Eight Hundred Thousand ($10,800,000) Dollars.

The jury unanimously assesses punitive damages against the defendants under Instruction No. 25 at Twenty-Five Million ($25,000,000) Dollars.

/s/ SCOTT O. WRIGHT

SCOTT O. WRIGHT, Chief Judge

Kansas City, Missouri
Date: 5-29-85

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP]

CENTRAL TELECOMMUNICATIONS, INC.,
Plaintiff,
vs.
TCI CABLEVISION, INC., *et al.*
Defendants.

No. 83-4068-CV-C-5

ORDER

It is hereby

ORDERED that each of the following motions is overruled as being moot:

(1) Plaintiff's motion for sanctions (filed 3/29/84);

(2) Plaintiff's motion for sanctions (10/18/84);

(3) Defendants' motion to hold defendants' motion for a stay in abeyance (2/25/85); and

(4) Defendants' motion for an evidentiary hearing on attorney's fees issue (filed 3/12/85).

/s/ SCOTT O. WRIGHT
SCOTT O. WRIGHT
United States District Judge

June 5, 1985.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* v. TCI CABLEVISION, INC., *et al.,* *Defendants.*	83 4068 CV C 5 Chief Judge SCOTT O. WRIGHT

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for clarification of the judgment is sustained and the judgment herein is modified to provide that plaintiff may recover treble damages under either of its antitrust claims or actual and punitive damages under its tortious interference claim, but may not recover damages under more than one claim. It is further

ORDERED that plaintiff's motion for enhancement of its attorney's fees is overruled.

It is further

ORDERED that defendants' motion for a stay of execution is overruled.

[FILE STAMP]

Entered on June 5, 1985

CLERK
R. F. CONNOR

(By) DEPUTY CLERK
/s/ B. J. WOLKING

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP
Mar. 16, 1981]

TCI CABLEVISION, INC.,
a Nevada Corporation,
Plaintiff,

v.

CITY OF JEFFERSON CITY, MISSOURI,
a Municipal Corporation,
Defendant.

[JURY DEMANDED]

Case No.
81-4054-CV-C-W

COMPLAINT:

ANTITRUST, FIRST AMENDMENT, EQUAL PROTECTION, CIVIL RIGHTS, IRREVOCABLE LICENSE, LICENSE WITH AN INTEREST, EQUITABLE ESTOPPEL, VESTED RIGHTS, BREACH OF CONTRACT, AND DEDICATION CLAIMS; AND DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff TCI Cablevision, Inc. (hereinafter "TCI"), a Nevada corporation, demanding a jury trial, brings this action against the City of Jefferson City, Missouri, a municipal corporation (hereinafter "City"), and alleges as follows:

PRELIMINARY ALLEGATIONS

1. Defendant City is a municipal corporation existing under and by virtue of the laws of Missouri and located within the Western District of Missouri. The violations of law herein

described have been and are being performed within the Western District of Missouri; and the resulting injury to plaintiff has been and is being suffered within the Western District of Missouri.

2. Plaintiff TCI at all times herein mentioned was, and now is, a corporation in good standing existing under and by virtue of the laws of the State of Nevada. TCI was, and now is, licensed to do business in the State of Missouri, and is the lawful owner and operator of an existing cable television system (hereinafter sometimes referred to as a cablecasting system) within the City of Jefferson, State of Missouri.

3. A cable television system is not a public utility. A cable television system is a disseminator of news, information, and entertainment, and is thus a recognized First Amendment medium. By use of various means, including satellite-fed signals, cable television provides both original-content programming and programming which is selectively chosen by the cable television company from a variety of program sources.

4. Providing cable television service involves the conduct of business in interstate commerce.

5. On or about December 18, 1967, International Telemeter Corporation (a predecessor of TCI) entered into a ten-year, non-exclusive contract with the City for the purpose of providing cablecasting services to the City's residents. This contract and an associated permit are evidenced by the provisions of Ordinance 7974, and Ordinance 8356, and the acceptance by plaintiff's predecessors of the same. TCI ultimately succeeded to the contractual rights of International Telemeter Corporation by assignment, which assignment was approved by the City. TCI has operated a cable television system in the City since 1978.

6. At the time of the above-mentioned assignment, and repeatedly thereafter, the City indicated to TCI that it wanted TCI to expand the system and make substantial improvements in the system.

7. In reliance upon City's express approval of the above-mentioned assignment, and the resulting relationship between TCI and City, and in response to and reliance on continuing requests by the City to improve its cable television system, TCI has since 1978 expended additional and substantial sums of money to maintain, upgrade, extend, and improve its cable television system. Much of this additional investment was not required under the terms of the 1971 agreement, but was nonetheless requested by the City and provided by TCI pursuant to and in reliance upon such requests. The City at all times was informed of and had actual knowledge of such expenditure efforts, and investments by TCI.

8. In addition to the above-mentioned improvements and investments, TCI has in the past proposed certain other improvements and expanded programming which the City has either refused to allow, or has effectively prevented by not permitting TCI to charge subscriber rates sufficient to support such activities.

9. In late 1980, and without TCI's knowledge, the City initiated efforts to conduct a "Request for Proposals" (RFP) process. Pursuant thereto, the City sent a "Request For Proposals For Cable Television Service" to TCI and numerous other cable television companies. This RFP document (attached hereto as Exhibit 1) contains more than 200 pages of detailed specifications regarding the quality and quantity of cablecasting service the City desires. The RFP specifications are stated by the City to reflect "the City's regulatory policies" (Exhibit 1, page 6), but must be accepted by contract before the City will allow a chosen company to serve the City, and the terms of said contract are "incontestable."

10. The plaintiff is informed and believes, and thereupon alleges, that, in combination with other as yet unknown conspirators, the City is utilizing the RFP process to: (1)exclude plaintiff from the Jefferson City cable television market; and (2) select one cable television company to serve the Jefferson City cable television market, to the exclusion of all other

members of the cable communications media. Plaintiff is further informed and believes, and thereupon further alleges, that the RFP is a sham and a mere mechanism whereby the City will ratify a predetermination that TCI is to be excluded from the Jefferson City cable television market.

11. The City has gone forward with its RFP process, and did require any cable television company interested in serving the Jefferson City market to submit a detailed proposal pursuant to the RFP on or before March 9, 1981. Three different cable television companies did make differing applications to the City on March 9, 1981, all of which speak for themselves. TCI was one of those companies, and its application was, *inter alia,* for a renewal of its permit to engage in a lawful business in the City of Jefferson. The City has stated that it will consider TCI's permit to be "expired" on April 21, 1981; and that no cable television company will be allowed to operate after April 21, 1981, without a permit agreed to by the City.

12. Plaintiff is informed and believes, and thereupon alleges, that other members of the media in Jefferson City are not required to accept specifications such as those contained in the cable television RFP as a condition to engaging in their various business and First Amendment activities.

[ ][1]

SECOND CLAIM OF RELIEF
INJUNCTION—VIOLATIONS OF THE
FIRST AMENDMENT

23. TCI incorporates herein by reference the allegations of paragraphs 1 through 20 above, and further alleges as follows.

24. TCI is a member of the media, disseminating, *inter alia,* news, entertainment, and information. TCI engages in First Amendment activity in the City of Jefferson pursuant to a permit issued by the City.

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[1] Brackets indicate that material has been deleted.

25. This Claim for Relief seeks to redress the deprivation, under color of law, of rights secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution, and is brought pursuant to 42 U.S.C. 1983 and 28 U.S.C. §§2201 and 2202. Jurisdiction is conferred on this Court by 28 U.S.C. §§1343 and 1331.

26. The RFP and the other actions alleged above presently deprive and presently threaten to further deprive plaintiff TCI of rights guaranteed by the First Amendment, are discriminatory, and also unlawfully condition TCI's right to engage in First Amendment activity on compliance with the various above-mentioned requirements.

27. By reason of the City's above-described actions, TCI's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution have been violated and infringed. TCI has no adequate legal, administrative or other remedy by which to prevent or minimize the continuing irreparable harm to its constitutional rights. Unless the City is enjoined from the above-described violations of the freedom of speech and press, TCI will continue to suffer great and irreparable injury as aforesaid.

WHEREFORE, TCI prays for judgment as hereinafter set forth.

[ ]

WHEREFORE, plaintiff prays as follows:

A. For damages as alleged above and in such further amounts as are proved.

B. For the trebling of damages as appropriate.

C. For a declaration that: (1) the RFP process and its terms violate the First Amendment; and (2) the defendant is estopped to deny plaintiff the right to continue operating its cable television system in the City of Jefferson.

D. For an injunction permanently enjoining defendant from violating plaintiff's constitutional rights and from conspiring to unreasonably restrain trade.

E. For reasonable attorney's fees and costs.

F. For such other and further relief the Court deems just.

Dated: March 11, 1981

FARROW, SCHILDHAUSE & WILSON

By: /s/ HAROLD R. FARROW

Harold R. Farrow
Richard D. Harmon
H. Wayne Goodroe
35 Embarcadero Cove
Oakland, Calif. 94606
(415) 261-4100

HENDREN AND ANDRAE

By: /s/ HENRY ANDRAE

Henry Andrae
The Monroe House
235 East High Street
Jefferson City, MO 65102
(314) 636-8135

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP
Feb. 16, 1982]

TCI CABLEVISION, INC.,
a Nevada corporation,

Plaintiff,

vs.

CITY OF JEFFERSON CITY, MISSOURI,
a municipal corporation,

Defendant.

No. 81-4054-CV-C-W

ORDER

Upon due consideration, it is hereby

ORDERED that defendant's motion to dismiss is denied. *See Community Communications Company, Inc. v. City of Boulder, Colorado,* 50 U.S.L.W. 4144 (Jan. 13, 1982).

/s/ SCOTT O. WRIGHT
SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.

February , 1982.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP
Feb. 22, 1983]

CENTRAL TELECOMMUNICATIONS, INC.,
a Missouri corporation,
Plaintiff,

vs.

CITY OF JEFFERSON CITY, MISSOURI,
a municipal corporation, and
Serve: City Clerk and Mayor
Jefferson City, MO

TCI CABLEVISION, INC.,
a Nevada corporation,
Serve: CT Corp. Sys.
314 W. Broadway
St. Louis, MO 63102
Defendants.

Case No.
83-4068-CV-C-5

COMPLAINT AND DEMAND FOR JURY TRIAL

[ ][1]

[1] Brackets indicate that material has been deleted.

COUNT SEVEN

(FIRST AMENDMENT)

86. CTI incorporates by reference herein the allegations of paragraphs 1 through 48 above and further alleges as follows.

87. This claim for relief seeks to redress the deprivation, under color of law, of rights secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983. CTI is a cable television company and a disseminator of, among others, news, information and entertainment. These activities engaged in by CTI are speech activities protected by the First Amendment.

88. Defendant City has deprived CTI of its rights to engage in First Amendment dissemination by denying CTI a franchise to operate a cable television system within the corporate city limits of the City. These actions were taken intentionally by defendant City, under color of law, as part of the official policies of the City.

89. Defendant City's denial of a cable television franchise to CTI constitutes regulation of CTI's First Amendment rights of expression under impermissibly discretionary, vague, invidious and standardless criteria and procedures, and thus violates CTI's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

90. The above-described violations of CTI's First Amendment rights were malicious or in conscious disregard of CTI's rights and have directly and proximately caused CTI to suffer damage in the amount of Ten Million Dollars ($10,000,000).

WHEREFORE, plaintiff prays for judgment against defendant City in the amount of Ten Million Dollars ($10,000,000) or the damages otherwise determined to have been sustained by plaintiff together with interest thereon, reasonable attorneys' fees and the costs incurred in this action. Plaintiff also prays for a declaration that the franchise ordinances passed by the City are void as impermissible regulation of plaintiff's First Amendment rights.

COUNT EIGHT

(FIRST AMENDMENT)

91. CTI incorporates by reference herein the allegations of paragraphs 1 through 48 and 86 through 90 above and further alleges as follows:

92. This claim for relief seeks to redress the conspiratorial deprivation, under color of law, of rights secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

93. Defendant TCI conspired and acted jointly or in concert with defendant City and certain elected or appointed officials of defendant City to deprive plaintiff CTI, unconstitutionally and under color of law as the official policies of the City, its rights to engage in First Amendment dissemination as described in paragraphs 86 through 90 above.

94. Defendant TCI, by conspiring and acting jointly or in concert with defendant City and certain elected or appointed officials as described above, deprived CTI of its First Amendment rights of expression through the City's arbitrary and wrongful denial to CTI of a cable television franchise as described above.

95. Defendant TCI's conspiracies and actions described above were undertaken maliciously, in conscious disregard of CTI's rights and with the express intent to deprive CTI of its rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

96. Defendant TCI's violations of CTI's constitutional rights have directly and proximately caused CTI to suffer damage in the amount of Ten Million Dollars ($10,000,000.00).

WHEREFORE, plaintiff prays for judgment against defendant TCI in the amount of Ten Million Dollars ($10,000,000.00) or the damages otherwise determined to have been sustained by plaintiff together with interest thereon, punitive damages in the amount of Twenty Million Dollars ($20,000,000.00), reasonable attorneys' fees and the costs incurred in this action.

[ ]

/s/ R. LAWRENCE WARD

R. LAWRENCE WARD

/s/ G. STEPHEN LONG

G. STEPHEN LONG

of
SHUGHART, THOMSON & KILROY
A Professional Corporation
922 Walnut Street
P. O. Box 13007
Kansas City, Missouri 64199
816/421-3355

/s/ JOSEPH Y. DECUYPER by R.L.W.

JOSEPH Y. DECUYPER

of
SNOWDEN & DECUYPER
200 SCD Building
6317 N.E. Antioch Road
Kansas City, MO 64119
816/455-0505

Attorneys For Plaintiff

Plaintiff CTI hereby demands a jury trial pursuant to Local Rule 14.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by

reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) *Amount of damages payable to foreign states and instrumental titles of foreign states*

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) *Definitions*

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[FILE STAMP]

CENTURY FEDERAL, INC.,
a California Corporation,
Plaintiff,

vs.

CITY OF PALO ALTO, CALIFORNIA,
a Municipal corporation;
CITY OF PALO ALTO UTILITIES,
a Municipal utility;
CITY OF MENLO PARK, CALIFORNIA,
a Municipal corporation; and
CITY OF ATHERTON, CALIFORNIA,
a Municipal corporation,
Defendants.

No. C-85-2168 EFL

Order Granting
Partial Summary
Judgment

This action involves an aspiring cable television operator's first amendment challenge to the defendant municipalities' use of an exclusive franchising arrangement to limit to one the number of cable operators granted access to those facilities necessary to install cables within the defendants' boundaries. Plaintiff now moves for an order granting partial summary judgment on the issue of liability, asking this Court to hold as a matter of law that such a government-imposed restriction on the number of cable speakers is facially invalid under the first amendment. After considering oral argument and reviewing the extensive briefs and exhibits filed on both sides, this Court hereby grants plaintiff's motion for partial summary judgment. In doing so, the Court holds only the following: First, that under the undisputed facts of this case, the insignificant, if any, increase in disruption to the public domain resulting from the

initial installation of more than one cable system, as opposed to a single system, does not constitute a substantial or important governmental interest so as to justify the suppression of all cable speakers except the one to which the municipalities grant permission to speak; and second, that because cable television is more closely analogous to newspapers than the broadcast media, the fact that the cable television market in a proposed service area is a natural monopoly does not justify greater governmental regulation of cable operators than would otherwise be allowed under the first amendment.[1]

I. Background

Plaintiff Century Federal, Inc., is an aspiring cable television (hereinafter "CTV") operator. The defendants (hereinafter "the Cities") are three California municipalities, Atherton, Menlo Park, and Palo Alto, and a utility company owned by Palo Alto. Plaintiff attempted to enter the CTV business in each of the Cities, but was refused a business license and was told that it must participate in the franchise selection process conducted by Palo Alto on behalf of all the Cities. Plaintiff also sought permission to use the utility poles owned by the Pacific Telephone and Telegraph Company, the Pacific Gas and Electric Company, and the defendant City of Palo Alto Utilities, but was refused "pole attachment services" because it had no CTV operating franchise.[2]

The franchise selection process conducted by the Cities had two parts. First, the Cities issued a Request for Proposals (hereinafter "RFP"). This document specified the minimum

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[1] Although plaintiff's complaint on its face challenges the very existence of the Cities' franchising process, including the minimum requirements a cable television operator must meet before being eligible for a franchise, *see infra* note 3, on this motion the Court expresses no opinion on any aspect of the franchising process other than that part which limits to one the number of operators initially granted access to the facilities necessary for the installation of a cable system.

[2] Section 53066 of the California Government Code authorizes municipalities to license or franchise the construction of CTV systems using public property and easements. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1400 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986).

requirements that an applicant must meet in order to be considered for a franchise.[3] The RFP also requested certain technical, construction, ownership, and financial information concerning the applicant and its proposed system. The Cities planned subsequently to evaluate the applicants in a number of categories, including service and rates, technical/construction, financial, local commitment, and ownership/structure.

The second phase of the selection process involved negotiations with one or more of the so-called most qualified applicants. Although the RFP guidelines expressly referred to the granting of a "nonexclusive" franchise, implying that the Cities might grant a franchise to more than one CTV operator, it is undisputed that the Cities intended to grant a franchise to only one operator, at least initially. *See Central Telecommunications, Inc. v. TCI Cabletelevision, Inc.*, 800 F.2d 711, 712 n.1 (8th Cir. 1986) (under a similar RFP, court refers to such franchises as "de facto exclusive").

Of the four CTV operators who answered the RFP, which did not include plaintiff, the Cities targeted two for further negotiations. On October 7, 1985, the Cities awarded a franchise to Cable Coop, which, at least up until the date of oral argument on this motion, had not yet begun to install its CTV system.

Rather than participate in the RFP, plaintiff originally filed suit in this Court in September 1983, alleging that the franchising process as a whole violated the antitrust laws and the first amendment. *See Century Federal, Inc., v. City of Palo Alto,* 579 F. Supp. 1553 (N.D. Cal. 1984). On the antitrust claims, the Court granted defendants' motion to dismiss on the ground that the defendant municipalities were immune from liability for the challenged conduct. *Id.* at 1561. The Court denied the Cities' motion on the first amendment claims, however, finding that

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[3] An opinion published earlier in this case, Century Federal, Inc. v. City of Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984), lists in detail the minimum requirements set forth in the RFP. *Id.* at 1554 n.3.

plaintiff's pleadings alleged a cognizable constitutional deprivation that gave rise to significant factual questions that could not be resolved on the pleadings alone. *Id.* at 1565.

Subsequent to the above rulings, in January 1985, in response to the passage of the Cable Communications Policy Act of 1984, 47 U.S.C. sections 521-611 (Supp. 1986), this Court dismissed plaintiff's original first amendment claims without prejudice.[4]

In early March 1985, however, the Ninth Circuit decided *Preferred Communications, Inc., v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1984), *aff'd,* 106 S. Ct. 2034 (1986) (hereinafter "*Preferred I*"). Reversing in part the district court's granting of a motion to dismiss, the Ninth Circuit held in a wide-ranging opinion that a municipality could not "limit access by means of an auction process to a given region of [a] City to a single cable television company, where the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system[.]" *Preferred I,* 754 F.2d at 1411.

Within a few days after the release of the Ninth Circuit's decision, plaintiff filed the instant action, reasserting its first amendment claim.[5] The parties stipulated that the pleadings

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[4] This Court had hoped that the Communications Policy Act would resolve this litigation. The Act was intended to establish a comprehensive national CTV policy and envisions a franchising arrangement such as that proposed by the Cities. *See Preferred I,* 745 F.2d at 1400 n.3. The constitutionality of that Act is not being directly challenged in this litigation, but the Ninth Circuit has called into question the constitutionality of a number of its provisions in strong dicta in the *Preferred I* decision. *See id.* at 1401 n.4, 1411 n.14.

[5] In its earlier complaint, plaintiff also alleged a violation of the California constitution, but the parties did not assert any differences between plaintiff's rights under the first amendment and under the state constitution. *Century Federal,* 579 F. Supp. at 1554 n.1. In the instant action, plaintiff's complaint includes a challenge under the California constitution, but nearly all of the parties' discussion has focused upon the first amendment. Because this Court has found a violation of the first amendment, we do not reach the state constitutional issues.

and record of the prior action would be considered a part of this new action.

After the United States Supreme Court granted certiorari on the *Preferred I* decision, this Court stayed the disposition of the instant action pending the Supreme Court's decision. In *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986) (hereinafter *Preferred II*), the Supreme Court affirmed the judgment of the Ninth Circuit "on a narrower ground," *id.* at 2036, holding only that a CTV operator "seeks to engage [in activities that] plainly implicate the First Amendment," *id.* at 2037, and refusing to decide the applicable first amendment standard solely on the pleadings. *Id.* The Court left open the question of "whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." *Id.* at 2038 (Blackmun, J., concurring).[6]

Two weeks after the Supreme Court's decision, plaintiff filed the instant motion for partial summary judgment. Essentially, plaintiff's position is that the suppression of all cable speakers except one cannot be justified by any important or substantial governmental interest.[7] The Cities, on the other

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[6] The parties have disputed the precedential effect of the Ninth Circuit's *Preferred I* decision in light of the Supreme Court's holding, particularly with regard to the Court's remark that it was affirming on a "narrower ground." *Preferred II*, 106 S. Ct. at 2036. To date, it appears that the Ninth Circuit interprets the Supreme Court's holding as an affirmation that is binding on the lower courts of this Circuit. *See* Pacific West Cable Co. v. City of Sacramento, No. 85-2143, slip op. at 6 (9th Cir. Aug. 20, 1986) (citing *Preferred I* as affirmed by the Supreme Court). The more difficult question is discerning which parts of the Ninth Circuit's opinion are essential to its holding and which parts are dicta. *See* Tele-Communications of Key West v. United States, 757 F.2d 1330, 1338 n.3 (D.C. Cir. 1985) (expressing uncertainty on the "precise basis" for the Ninth Circuit's opinion in *Preferred I*).

[7] The reference to "important or substantial" government interests is based on the second step of the *O'Brien* test, O'Brien v. United States, 391 U.S. 367, 377 (1968), which, as explained below, the Court finds determinative in the disposition of this motion. The Ninth Circuit also refers to such interests as "legitimate." *Preferred I*, 754 F.2d at 1406.

hand, propose five interests that are furthered by a franchising process that allows access to only one CTV system: [8] 1) minimizing disruption of the public domain; 2) promoting first amendment values by ensuring that their residents, who allegedly live in a market that will economically support only one CTV operator (i.e., a natural monopoly), will receive cable service from that CTV operator that will provide the most reliable and highest quality service; 3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; 4) ensuring

[8] The Cities dispute the characterization of the franchising scheme as restricting access to only one CTV operator on the ground that the mandatory commercial access channels provided by the chosen franchisee will guarantee to other nonfranchised CTV operators an opportunity to "speak" to the Cities' residents. Such a contention, however, is based on the faulty premise that the first amendment allows the government to infringe on the free speech rights of a speaker based on a possibility that there are alternative avenues of communication available to reach the desired audience. "[O]ne is not to have the exercise of his liberty of expression in an appropriate place abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939). Furthermore, a franchised operator might have use of as many as fifty or more channels on its own system, but a nonfranchised operator as few as one under a commercial access program.

In a separate opposition brief, defendant Menlo Park objects to the characterization on a different basis. Breaking from the other defendants, Menlo Park concedes that under the Ninth Circuit's *Preferred I* decision "it may lack authority to artificially limit to *one* the number of cable operators in Menlo Park". Defendant Menlo Park's Memorandum in Opposition, p. 3 (emphasis in original). Menlo Park claims that it is not attempting to limit to one the number of CTV operators in Menlo Park, but only seeks a "limited right" in a potential natural monopoly market to decline issuing additional franchises until its chosen operator has had the "reasonable opportunity to establish service." *Id.* at 1-2. Of the various weaknesses inherent in Menlo Park's position, the most compelling is that, if this Court finds that the initial restriction violates the first amendment (as we do), Menlo Park's argument is tantamount to claiming that the immediate Constitutional infirmities of its regulation are somehow cured retroactively by a subsequent change in the process that will make it Constitutional at that later time.

community and commercially-leased access channels; and 5) encouraging the development of state-of-the-art cable systems with adequate channel capacity.

II. Standard of Review on a Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Consequently, the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986) (emphasis in original). The Supreme Court has described the district court's review of the facts as a two-step process. First, the court must determine whether a particular fact is material, that is, a fact that will affect the outcome of the suit under the applicable substantive law. *Id.* " Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Second, if a fact is material, the court must determine if the dispute about the material fact is "genuine," that is, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Accordingly, this Court's initial inquiry must be on the materiality of the various factual questions. In the instant case, the Court must review each of the governmental interests alleged by the Cities and determine which of these, if any, the substantive law recognizes as important or substantial so as to justify the resultant impact on the first amendment rights of potential CTV operators. Only after a determination that an interest is important or substantial can the Court reach the issue

of whether genuine issues of fact exist on the question of whether the franchising process "furthers" that interest.[9]

III. Cable Television and the First Amendment

The United States Supreme Court has left no doubt that a CTV operator is a speaker entitled to first amendment protection. *Preferred II,* 106 S. Ct. 2034, 2037 (1986). The Court did not state, however, the degree of protection to which a CTV operator is entitled or the amount of governmental regulation of that medium permissible under the first amendment. The threshold issue on this motion, therefore, is whether the first amendment allows the government the same wide latitude in regulating the CTV industry as it allows in the broadcast medium, *see Red Lion Broadcasting Co., Inc. v. Federal Communications Commission,* 395 U.S. 367 (1969); *National Broadcasting Co. v. United States,* 319 U.S. 63 (1943), or whether the degree of protection should be closer to that enjoyed by the traditional media, such as newspapers.[10] *See Miami Herald v. Tornillo,* 418 U.S. 241 (1974).

As defendants' lead counsel admitted at oral argument, if this Court were to apply the same degree of protection that more traditional forms of the media receive, the Cities' restriction on access to its residents obviously would violate the first amendment. We recognize that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion,* 395 [U.S.] at 386. Application of a lesser standard of protection, however, is an

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[9] For example, because the law recognizes disruption to the public domain as an important or substantial governmental interest, *see Preferred I,* 754 F.2d 1406, this Court must determine whether genuine issues of fact exist on the amount of disruption that will occur if the Cities' franchising scheme initially allowed access to more than one CTV operator.

[10] As the parties did, the Court will use newspapers as an example of the more traditional forms of public communicators, such as book publishers, public speakers, and pamphleteers, *see Preferred II,* 106 S. Ct. at 2037, that are entitled to a more protective first amendment standard than the broadcasting media.

exception to the rule that must be justified by a particular difference. When the Supreme Court was faced with the question of whether a lesser first amendment standard applied to films, it stated that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule." *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952). Consequently, in developing the first amendment standard to be applied in this case, the question becomes whether there are any differences in the characteristics of the CTV medium that justify a lesser standard of protection for it that would allow a correspondingly greater degree of governmental regulation.

A. Lack of Physical Scarcity in the Cable Television Medium

The Ninth Circuit has recognized that the greater degree of governmental regulation of broadcasting rests on the physical scarcity of radiowaves. *Preferred I,* 745 F.2d 1396, 1403 (9th Cir. 1985), *aff'd,* 106 S. Ct. 2034 (1986). As this Court noted earlier in the instant case, "the electromagnetic spectrum is simply not physically capable of carrying the messages of all who desire to speak over it. This principle has been reaffirmed many times." *Century Federal, Inc. v. City of Palo Alto,* 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 101 (1973); *Red Lion,* 395 U.S. at 389).

Notwithstanding its application to the broadcast medium, the Seventh and D.C. Circuits have expressly concluded that the "physical scarcity rationale" is irrelevant to an evaluation of government regulation of cable television. *Quincy Cable TV, Inc. v. Federal Communications Commission,* 768 F.2d 1434, 1449 (D.C. Cir. 1985) ("[T]he 'scarcity rationale' has no place in evaluating . . . cable television."); *Omega Satellite Products v. City of Indianapolis,* 694 F.2d 119, 127 (7th Cir. 1982) ("[F]requency interference [is] a problem that does not arise with cable television.").

The opinions from these two Circuits strongly suggest that physical scarcity could never arise in a cable television setting. The Ninth Circuit, however, expressly left open the question of how a municipality should "allocate access to poles and conduits to competing cable systems when these structures are incapable of accommodating all those seeking access," because plaintiff had alleged that space was available and the court assumed that fact to be true. *Preferred I,* 754 F.2d at 1404.

In any event, this Court also finds it unnecessary to address the issue of whether physical scarcity could ever arise in the CTV medium because defendants admit that there is no physical scarcity in the instant case.[11]

Consequently, the characteristic in broadcasting that justifies increased governmental intrusion in that medium is absent in the instant case.

B. Natural Monopoly as a Justification

Most of the argument on the instant motion centered around whether the natural monopoly or economic scarcity rationale justified a greater degree of government regulation than allowed in a newspaper context. Although the Ninth Circuit in *Preferred I* briefly commented "[i]n passing" on the natural monopoly argument, it did not decide the issue because the court accepted as true plaintiff Preferred's allegation on the economic feasibility of competition for cable services in the Los Angeles area. *Id.* The court seemed to imply, however, that a natural monopoly would not be a justification for exclusive franchising. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.,* 800 F.2d 711, 716 (8th Cir. 1986) (interpreting the Ninth Circuit's decision as implying this conclusion).

In the instant case, the issue must be confronted because the parties have hotly contested the question of whether the CTV market in the proposed service areas is a natural monopoly. The Cities envision a trial on this economic question, with both sides presenting expert testimony, based upon studies and

[11] The defendants made no significant argument in favor of the physical scarcity in their briefs, and their lead counsel admitted at oral argument that none in fact existed in this case. Tr. at 21:21-22.

statistics, opining on the likelihood that the relevant market is a natural monopoly. According to the defendants, if the trier of fact finds that there is a reasonable likelihood that the market is a natural monopoly, then the Cities should be able to institute their franchising scheme.

Before determining whether there is a triable issue of fact on the question, however, this Court must first decide whether the question is material under applicable substantive law. Defendants concede that if this Court decides that the law applicable to newspapers controls in this case, then the natural monopoly issue is immaterial and cannot defeat plaintiff's motion.

The Cities' argument on the materiality of the natural monopoly rationale is basically as follows: because the CTV market in our service area is a natural monopoly, it shares a characteristic analogous to the physical scarcity trait in the broadcasting medium, which results in an inherent limitation on the number of possible speakers. Such a trait warrants government regulation of the number and identity of the speakers, which ensures the enhancement of first amendment values.

The Supreme Court rejected this economic scarcity rationale in the context of newspapers, however, in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). In striking down a Florida statute that required newspapers to print replies of persons subjected to editorials that assailed their character, the Court rejected the suggestion that purely economic constraints on the number of newspaper voices available in the given community justified otherwise unwarranted intrusions into first amendment rights. *Id.* at 247-56. This Court is convinced that the first amendment mandates the same conclusion in the instant case.

This Court recognizes that newspapers, the most traditional form of the media, are historically the source of most of the debate on politics and government that lies at the core of first amendment values. *Id.* at 257-58. Yet, just as a "newspaper is more than a passive receptacle or conduit for

news, comment, and advertising," *id.* at 258, the Supreme Court has stated that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *Preferred II,* 106 S. Ct. at 2037 (quoting *Federal Communications Commission v. Midwest Video Corp.,* 440 U.S. 689, 707 (1979)); *see also Preferred I,* 754 F.2d at 1410 n.10 (recognizing that although CTV operators do transmit programs produced by others, they do exercise considerable editorial discretion). Although the Supreme Court stopped just short of equating cable television to more traditional forms of the media, *see Preferred II,* 106 S. Ct. at 2037, the D.C. Circuit has concluded that there is no "meaningful 'distinction between cable television and newspapers.' " *Quincy,* 768 F.2d at 1450 (quoting *Home Box Office, Inc. v. Federal Communications Commission,* 567 F.2d 9, 46 (D.C. Cir. 1977)). This Court agrees that "the analogy [of cable television] to more traditional media is compelling." *Quincy,* 768 F.2d at 1450.[12]

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[12] The *Quincy* court noted the findings of two influential commissions that have reached the same conclusion, quoting one as finding that "[c]able television, by freeing television from the limitations of radiated electro-magnetic waves, creates . . . a situation more nearly analogous to that of the [print] press." 768 F.2d at 1450 (quoting SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE 92 (1971)).

Once we get beyond the difference in the burden to the public domain, the Court finds no constitutionally significant distinction between the content and form of the messages delivered by the CTV medium and newspapers. A CTV operator communicates nearly the same variety of information as the *New York Times,* including general news and political commentary on local, state, national, and international issues, religious programming, and entertainment and educational shows. Although most cable programming today is not originated by CTV operators, they exercise the same editorial discretion as the newspaper editors who decide which nationally syndicated columnists to publish. Certainly, a newspaper would not receive less first amendment protection because it published only syndicated columnists and wire stories. Finally, the very RFP at issue in this case evidences a trend toward greater operator involvement in original programming, listing "operator-originated programming" as one of the five types of services that a potential franchisee must be capable of providing. The RFP envisions the franchisee as supplying a fully-equipped broadcast studio and two to three small-scale mobile production units to facilitate the operator's own (and other community-based) programming.

Not all Circuits have agreed with the D.C. Circuit's conclusion that the reasoning in *Miami Herald* applies to render the natural monopoly rationale irrelevant in the cable television context. *Quincy,* 768 F.2d at 1450; *Home Box Office,* 567 F.2d at 46. Defendants cite the Seventh, Eighth, and Tenth Circuits in support of their position that the existence of a natural monopoly is a basis for the limitations on access that the Cities seek to impose. *Central Telecommunications, Inc. v. CI Cabletelevision, Inc.,* 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder,* 660 F.2d 1370 (10th Cir. 1981), *cert. denied,* 456 U.S. 1001 (1982). This Court finds these decisions unpersuasive, however, because each lacks a thorough analysis on the relationship between the proposed regulation and the characteristics of the CTV medium, which analysis we believe is now mandated. *See Preferred II,* 106 S. Ct. at 2038.

The most extended discussion of the issue was that of the Tenth Circuit in *Community Communications,* 660 F.2d at 1376-79. The Tenth Circuit distinguished *Miami Herald* by tying the natural monopoly characteristics of the CTV medium to the burden a cable system causes on public utility facilities and streets. Noting that the economic scarcity in *Miami Herald* was "unrelated to the disruptive use of the public domain requiring a government license," *id.* at 1379, the court found that, in contrast, a CTV operator "must significantly impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information." *Id.*

The weakness in the Tenth Circuit's reasoning stems from the lack of a link between a distinctive characteristic of cable television, *e.g.,* the disruption to the public domain, and the proposed government regulation. The fact that a CTV system can potentially disrupt the streets might justify certain government regulations aimed at minimizing such disruption. As the Ninth Circuit noted, however, "[the Tenth Circuit's] statement

is too broad. It suggests that simply because cable's disruption of the public domain gives rise to a need for licensing, it would also justify the monopoly the City seeks to create by its auction process." *Preferred I,* 754 F.2d at 1405.

The Seventh Circuit's opinion in *Omega* is similarly unpersuasive. The court acknowledged that "while today most newspaper markets are natural monopolies, no one thinks that entry into those markets could be regulated without creating profound First Amendment problems." *Omega,* 694 F.2d at 128. Nevertheless, the court summarily concluded that the "apparent natural monopoly characteristics of cable television provide . . . an argument for regulation of entry." *Id.* at 127-28. The opinion was devoid of any reason why such a characteristic should make any difference in the cable television setting when it does not in the newspaper context.[13] Indeed, the court did not appear to take a definitive stand on the issue, citing the Tenth Circuit in *Community Communications* and concluding only that "[p]robably there are enough differences between cable television and the nontelevision media to allow more government regulation of the former." *Id.* at 128.

Finally, while this motion was under submission, the Cities cited to this Court the recent Eighth Circuit decision in *Central Communications,* 800 F.2d 711. That case involved an existing franchised CTV operator's effort to prevent the city from granting a new exclusive franchise to a competing company. The Eighth Circuit held that the natural monopoly characteristics of defendant city's cable market justified the city's granting of a de facto exclusive franchise to a single CTV operator. *Id.* at 717. After reviewing the Supreme Court's *Preferred II*

[13] Other than the natural monopoly theory, the court also briefly noted the public disruption argument, *Omega,* 694 F.2d at 127, and the fact that television in general enjoys "universal access to the home," which results in a "felt need to protect children." *Id.* at 128. Again, the court did not link these characteristics to the regulation of the entry of CTV operators.

opinion,[14] the court cited and discussed the *Community Communications* and *Omega* decisions in support of the proposition that cable television is more analogous to broadcasting than newspapers, therefore justifying an exclusive franchising scheme.[15] Although "recogniz[ing] that there are profound first amendment implications inherent in the regulation of cable operators," *id.* at 716, the Eighth Circuit similarly failed to explain why a CTV operator should receive less first amend-

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[14] The Eighth Circuit read the Supreme Court's opinion as "suggest[ing] that the cable medium may be distinguished from the newspaper medium and that more government regulation of a cable medium may be permissible because cable requires use of public ways and installation of cable systems may disrupt public order." *Central Telecommunications,* 800 F.2d at 714. This Court reads *Preferred II* as definitely holding only that the CTV medium may be distinguishable from the newspaper medium *because* of the greater disruption to the public domain that can result with the former. The Supreme Court in fact did not suggest that the fact that cable television might disrupt public resources somehow justifies government regulation unrelated to this characteristic.

[15] The Eighth Circuit's opinion lacks any discussion of the D.C. Circuit's clear position to the contrary enunciated in *Home Box Office,* 567 F.2d 9, and *Quincy,* 768 F.2d 1434. In fact, *Central Telecommunications* incorrectly implies that the D.C. Circuit's position is in accordance with the Seventh and Tenth Circuits. The court cites Tele-communications of Key West v. United States, 757 F.2d 1330 (D.C. Cir. 1985), as support for the proposition that "[t]he apparent natural monopoly characteristics of cable television . . . provide an argument for regulation of entry." *Central Telecommunications,* 800 F.2d at 716 (quoting *Omega,* 694 F.2d at 126-27). In fact, the issue of natural monopoly was never raised in the *Key West* opinion. In a parenthetical, the Eighth Circuit characterizes the *Key West* decision as "[h]olding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's exclusive franchising scheme would violate the first amendment." *Id.* at 716 (citing *Key West,* 757 F.2d at 1338). This Court reads "practical reasons" as referring to circumstances such as the physical burden on the Air Force base, not to market conditions. *See Key West,* 757 F.2d at 1335-36.

ment protection than a newspaper. Cautioning that it would not decide any question not squarely before it, the court considered the natural monopoly question "only in terms of the competing technologies offered" by the two competing CTV operators in the case. *Id.* at 716-17. The court then noted that the defendant cable company proposed to provide a more technologically advanced system with far more channels at a lower cost than plaintiff was currently providing. *Id.* at 717. Therefore, although plaintiff had "a first amendment interest in remaining as a cable television 'speaker'," defendant's "proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable." *Id.*

Like the Seventh and Tenth Circuits, the Eighth Circuit did not explain which characteristics of the CTV medium justify application of less protection than afforded to the nonbroadcasting media. Clearly, the first amendment will not tolerate the government's suppression of speakers, even on a content-neutral basis, in the newspaper, movie, and book industries on the ground that the one speaker granted access provides the greatest variety of articles, movies or publications at the lowest price. It is also clear under *Miami Herald* that the fact that the newspaper, movie or book markets in a given community are a natural monopoly does not justify greater governmental regulation of such first amendment speakers.

In an age when most people receive their daily news via the television, that medium has established a role as critical to the free flow of ideas and information in this society as any of the more traditional media. The physical scarcity that justified the government's unparalleled intrusion into the broadcasting medium simply does not exist in this case. The Supreme Court has always stressed that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it. . . ." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557 (1975). As a result, a particular characteristic of a given form of expression can only justify government regulation aimed at addressing that particular characteristic.

Although the fact that cable television places a heavier burden on the public domain than more traditional forms of the media may justify some government regulation of that burden, the defendant Cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.

IV. Application of the O'Brien Test

Concluding that the allowable degree of governmental regulation is not fixed by physical or economic scarcity does not mean that all regulation of CTV operators is invalid. *Preferred I,* 754 F.2d 1396, 1405 (9th Cir. 1985), *aff'd,* 106 S. Ct. 2034 (1986). The first amendment allows some government regulations of noncommunicative aspects of speech. *Id.* As the Supreme Court has noted, "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Preferred II,* 106 S. Ct. 2034, 2038 (1986) (citing *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 805-07 (1984); *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968)).

The propriety of governmental regulations of noncommunicative aspects of speech is judged by the standard enunciated in *United States v. O'Brien,* 391 U.S. 367.[16] Under

[16] The parties disagreed as to what the appropriate test should be in this case. The Court notes, however, that *O'Brien* was applied by the Ninth Circuit in *Preferred I,* 754 F.2d at 1405-07, and cited by the Supreme Court in *Preferred II,* 106 S. Ct. at 2038. Additionally, plaintiff argued that the *O'Brien* test was inappropriate because the RFP process was not content-neutral. We hold for the purposes of this motion only that the regulation at issue is applied in content-neutral fashion, but note the Ninth Circuit's finding that "allowing only a single company selected through the franchise process to erect and operate a cable system in the region. . . creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or views expressed in, their proposed programs." *Preferred I,* 754 F.2d at 1406. This in fact appears to be the basis upon which the Ninth Circuit found that the *O'Brien* test was not met. *See id.* at 1406-07.

the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on first amendment freedom is no greater than essential to further that interest. *O'Brien,* 391 U.S. at 377. The defendant Cities bear the burden of proving that the elements of this test are satisfied. *Preferred I,* 754 F.2d at 1406 n.9; *Playtime Theaters, Inc. v. City of Renton* 748 F.2d 527, 535 (9th Cir. 1984), *rev'd on other grounds,* 106 S. Ct. 925 (1986).

To reiterate, the only government regulation addressed on this motion is that part of the Cities' franchising process that limits to one the number of CTV operators given access to the facilities necessary to install a cable system.

As to the first step of the *O'Brien* test, this Court finds that, as a matter of law, a franchise arrangement is within the Cities' constitutional power of government.[17] Because the second step, whether the regulation furthers an important or substantial governmental interest, is determinative on the instant motion, the Court finds it unnecessary to reach a decision on whether there are genuine issues of material fact under the third and fourth steps.

As noted earlier, the Cities have alleged five interests to satisfy the second step of the *O'Brien* test: (1) minimizing disruption of the public domain; (2) promoting first amendment values by ensuring that their residents receive CTV service from that operator who will provide the most reliable and highest quality service; (3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; (4) ensuring community and commercially-leased access channels; and (5) encouraging the development of state-of-the-art cable systems with adequate channel capacity. This Court finds as a matter of law

[17] California Government Code section 53066 expresses a clear legislative intent on the part of the California legislature to delegate government regulation over CTV operators to local governments. *Preferred I,* 754 F.2d at 1413.

that, of these five interests, only the facts underlying the first, disruption to the public domain, are material so as to warrant consideration on this summary judgment motion. As to the last four, none state an important or substantial governmental interest that would justify the severe impact on the first amendment rights of all potential CTV operators except the one given access.[18] It is to these last four alleged interests that the Court will first turn.

These four interests are inherently related to the natural monopoly rationale. Essentially, the Cities argue that if there is a reasonable probability that their service area will economically support only one CTV operator. then they should be able to choose, at the outset, that operator who will provide the highest quality service and use the offer of an exclusive franchise as a plum to bargain for certain concessions, e.g., access channels, that they might not be able to acquire if an operator knew that it would have to compete with other cable providers. The existence of a state-of-the-art CTV operator that provides quality service, including community and commercial access channels, to all areas within their boundaries best ensures, the Cities argue, that the values of the first amendment will be furthered because the Cities' residents will have expanded opportunities to receive diverse sources of information.

The Cities' position is analogous to one taken by municipalities defending antitrust suits by cable operators. They have argued, as cities have successfully done with such industries as water and electricity, that regulation of natural monopolies maximizes economic efficiency, and consequently, consumer welfare. Judge Posner of the Seventh Circuit explains this reasoning in the CTV setting:

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[18] In applying the second step of the *O'Brien* test, the Supreme Court applies a balancing test, asking whether the alleged governmental interest is sufficiently substantial to justify the resultant impact on free expression. *See, e.g.,* Members of the City Council v. Taxpayers for Vincent, 104 S. Ct. 2118, 2129 (1984).

The Cities argued these same alleged interests in their amicus brief to the Ninth Circuit in *Preferred I,* to which the court responded in a footnote: "We are not convinced that restricting the number of cable operators in the manner set forth in . . . [Preferred's] complaint furthers these interests in a manner consistent with the First Amendment." 754 F.2d at 1406 n.9.

> "[I]n a 'natural monopoly'...the benefits, and indeed the very possibility, of competition are limited. You start with a competitive free-for-all...but eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. In the interim there may be wasteful duplication of facilities. This duplication may lead not only to higher prices to cable television subscribers, at least in the short run, but also to higher costs to other users of the public ways.... An alternative procedure is to pick the most efficient competitor at the outset, give him a monopoly, and extract from him in exchange a commitment to provide reasonable service at reasonable rates."

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982).

The Cities essentially argue that the same is true in the context of the first amendment. Just as the regulation of water and electric companies—or CTV operators as the case may be—enhances consumer welfare through economic efficiency, the regulation of CTV operators furthers the purposes of the first amendment. But in this case, what may foster economic efficiency most certainly inhibits the first amendment.

The paternalistic role in the first amendment that the Cities envision for government is simply inconsistent with the purpose and goals of the first amendment. The Cities nevertheless contend that such a role is consistent with the Supreme Court's often-cited passage that, under the first amendment, it is the rights of viewers and listeners that is paramount, not the rights of speakers. *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 390 (1969). We disagree. In fact, the rationale of the Court is just the opposite. The Court proceeds to explain in *Red Lion* that because the viewers' rights are paramount, "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market...." *Red Lion,* 395 U.S. at 390.

Elsewhere, the Court has explained that the Constitution "command[s] that government itself shall not impede the free flow of ideas...." *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 252 (1974) (quoting *Associated Press v. United States,* 326 U.S. 1, 20 (1945)). We reach our conclusion with the first amendment interests of the Cities' residents foremost in mind, for their rights are endangered by a governmental attitude that government knows best how to fine tune the flow of information to which they have access. Furthermore, this Court agrees with the Ninth Circuit in *Preferred I* that such governmental intrusion carries with it the inherent risk of covert discrimination against certain CTV operators. *See supra* note 16.

Consequently, the factual questions presented by the Cities on the above four alleged interests are immaterial under the applicable substantive law, and therefore, cannot give rise to issues of fact that can defeat plaintiff's motion for summary judgment.

The analysis is different, however, on the Cities' first alleged interest, disruption to the public domain. In *Preferred I,* the Ninth Circuit recognized that a "City has legitimate interests in public safety and in maintaining public thoroughfares." *Preferred I,* 754 F.2d at 1406; *see also Community Communications Co. v. City of Boulder,* 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. denied,* 456 U.S. 1001 (1982) ("A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur.") Additionally, the fact that a cable system burdens public resources is a characteristic of the medium not shared with traditional media such as newspapers. Therefore, even when applying to CTV operators the same first amendment standard applied to newspapers, the allowable governmental regulation must still be viewed in light of those important or substantial governmental interests specifically implicated by the noncommunicative aspects of the CTV medium.

The above finding that, under the applicable substantive law, the Cities have an important or substantial governmental

interest in minimizing disruption to the public domain does not end the inquiry. For purposes of this motion, the Court next must determine whether the Cities have offered sufficient evidence to create a genuine issue of fact on the question of whether the proposed limitation on access "furthers" that governmental interest. *See O'Brien,* 391 U.S. at 377 (the second step is whether the challenged regulation "furthers" an important or substantial governmental interest). That is, have the Cities offered sufficient evidence on the degree of disruption that will result if they initially allow more than one CTV operator to lay cables?

Both sides presented exhaustive evidence on the disruption that results from the installation and maintenance of cable systems, which run underground and on telephone poles. The Cities presented declarations from their experts on everything from the danger posed to other cable lines to the likely increase in the number of complaints the Cities will receive regarding remiss CTV workers who leave backyard gates open for opportunistic family pets.[19]

The Cities made no showing, however, on how much more disruptive granting access to more than one CTV system would be when multiple systems are installed simultaneously as opposed to the installation of a single system. What is at issue here is a facial challenge to a franchising scheme that grants access to the first CTV operator to lay cables within a particular service area. Consequently, the Cities cannot justify a limitation to one on the ground that, in general, a CTV system is disruptive to the public domain. The Cities are willing to allow the installation of the first system. The question must then

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[19] For example, the Cities submit expert declarations stating that the trenching necessary to install a cable system underground carries with it such risks as damaging other utility services, destroying the physical integrity of the road surface in which trenching is performed, injuring vehicles using the streets, delaying resurfacing of the Cities' roadways, adversely impacting local business, interfering with vehicular, pedestrian, and bicycle traffic, and damaging or obstructing property. Defendants Palo Alto and Atherton's Memorandum in Opposition, pp. 17-18 n.17.

become: how is the government's interest in the public domain effected if access is granted initially to more than one system? To this, the Cities provide no answer.

The Cities address this issue only by arguing that unless two or more CTV systems are installed simultaneously, the disruptive burden will be increased whenever more than one system is constructed within the same service area. *See* Defendants Palo Alto and Atherton's Memorandum in Opposition, pp. 17-18. This may be so. But such a contention is incongruous to the facts of this case because when the RFP was issued no cables had previously been installed, the Cities intended to allow installation of one system, and simultaneous installation of multiple systems was possible. This is not a case in which one system has already been fully installed and another CTV operator subsequently seeks to install another system over the same public domain. If disruption can be minimized by simultaneous installation, then what prevents the Cities from taking advantage of that fact with proper time, place, and manner restrictions? Indeed, plaintiff has stated that requiring simultaneous installation would be a valid government regulation. *See* Plaintiff's Reply Memorandum, pp. 13-14.[20]

Because the Cities have made no showing that initially allowing access to more than one operator will implicate or "further" their important or substantial interest in regulating disruption to the public domain, this Court finds that, as a matter of law, there are no genuine issues of material facts under the second step of the *O'Brien* test.

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[20] We do not express an opinion on the issue of whether the public disruption interest could ever justify the total ban on a particular CTV operator's installation of any of its own cables, but the Ninth Circuit's *Preferred I* opinion seems to suggest that it could not. 754 F.2d at 1406.

V. Conclusion

We have not intended to suggest in this decision, nor do we read the Ninth Circuit's *Preferred I* opinion as holding, that the Cities necessarily have to open their cable facilities to all comers regardless of size, shape, quality or qualifications. *Accord Pacific West Cable Co. v. City of Sacramento,* No. 85-2143, slip op. at 6 (9th Cir. Aug. 20, 1986). We have not needed to reach the issue of permissible minimum requirements that the Cities might impose on all franchisees. This Court only holds on this motion that the Cities have not offered sufficient evidence to create a genuine issue of material fact on the question of whether there is a substantial or important governmental interest to justify limiting to one the number of CTV operators granted access to the facilities necessary for the installation and maintenance of a cable system. Therefore, under the undisputed facts of this case, that part of the Cities' RFP that imposes such a restriction is unconstitutional on its face.

According to the Cities, their entire franchising scheme depended upon limiting initial access to one CTV operator. Therefore, the Court is now unsure as to what, if any, issues in this case are still unresolved other than damages. Accordingly, the Court orders that a status conference in this case be held at 3:30 p.m. on February 4, 1987. The Court further orders that three weeks prior to that date, plaintiff file a status conference statement listing the remaining issues in this case. One week thereafter, the defendant is to file its version of the same status conference statement.

IT IS SO ORDERED.
Dated: December 3, 1986.

/s/ EUGENE F. LYNCH

EUGENE F. LYNCH
United States District
Judge

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF THE PETITIONERS

TELE-COMMUNICATIONS, INC.
(Ownership Indicated by Indentation)

Name	State
CENTRE VIDEO CORPORATION	PA
Allegheny Cablevision, Inc.	PA
Centre Video Corporation of Ohio, Inc.	OH
Centre Video Corporation of West Virginia	WV
COMMUNITY TELE-COMMUNICATIONS, INC.	NV
Alabama T.V. Cable, Inc.	AL
Cablevision of Austin, Inc.	MN
Cablevision of Austin	MN
Columbus CableVision, Inc.	GA
Community Communications Company	CO
Community Realty, Inc.	NV
Community TCI of Kansas, Inc.	KS
Community TCI of Ohio, Inc.	NJ
Miami Valley Cable, Inc.	OH
New Castle Cable Communications, Inc.	IN
Com-West, Inc.	DE
Cableview of Albert Lea, Inc.	MN
Cablevision of Austir	MN
CTCI Cablevision, Inc.	DE
Poughkeepsie Cablevision, Inc.	NY
Pueblo T.V. Power, Inc.	CO
T.V. Power of North County, Inc.	CA
Dodge City CATV, Inc.	KS
Fulton Community Antenna Television Systems, Inc.	IL
Richland Cable System, Inc.	WI

Name	State
Satellite Services, Inc.	DE
SSI 2, Inc.	NV
TCI Cable Management Corporation	CO
TCI Cablevision, Inc.	NV
Twenty CATV, Inc.	GA
EARTH STATIONS, INC.	NV
Cable Communications Equities, Inc.	NV
Milbank-Grant County Development Corporation	SD
LIBERTY TV CABLE, INC.	DE
TCI HOLDINGS, INC.	
Cable Media, Inc.	CO
TCI Media of Albion	PA
TCI Media of Bedford County	PA
TCI Media of Jefferson County	PA
TCI Media of Lake County	OH
TCI Media of Lycoming Valley	PA
TCI Media of McKean County	PA
TCI Media of Moshannon Valley	PA
TCI Media of Somerset County	PA
TCI Media, Inc.	OH
TCI Media of Albion	PA
TCI Media of Central Pennsylvania, Inc.	PA
TCI Media of Eastern Ohio, Inc.	OH
TCI Media of Kent Ravenna, Inc.	OH
TCI Media of Andover, Inc.	OH
TCI Media of Lake Erie, Inc.	OH
TCI Media of Jefferson County	PA
TCI Media of Lycoming Valley	PA
TCI Media of MBS, Inc.	PA
MBS Cable TV, Inc.	OH

Name	State
TCI Media of McKean County.....	PA
TCI Media of Moshannon Valley.....	PA
TCI Media of Northern Pennsylvania, Inc.	PA
TCI Media of Centre County	PA
TCI Media of Mount Union, Inc.	PA
TCI Media of Ridgway, Inc.	PA
TCI Media of Waynesburg, Inc.	PA
TCI Media of West Virginia, Inc.	WV
TCI Media of New York, Inc.	OH
TCI Media of Adirondacks, Inc.	NY
TCI Media of Opennga, Inc.	DE
TCI Media of Bedford County...	PA
TCI Media of Lake County.....	OH
TCI Media Corporation of Pennsylvania.....	PA
TCI Media of Addil, Inc....	OH
TCI Media of the Alleghenies, Inc.....	OH
TCI Media of Cambria County, Inc.	PA
TCI Media of Lake County	OH
TCI Media of Ohio, Inc.	OH
TCI Media of Kiski Valley, Inc.	PA
TCI Media of Pennsylvania, Inc.	PA
TCI Media of Ottawa County, Inc. ...	OH
TCI Media of Port Clinton, Inc..	OH
TCI Media of Somerset County.....	PA

Name	State
Horizon Tele-Communications, Inc.	NV
Athena Communications Corporation	DE
Athena Cablevision Corporation	DE
Athena Cablevision of Corpus Christi, Inc.	TX
Athena Cablevision of Tennessee and Kentucky, Inc.	TN
Tennessee-Kentucky Cable TV Company	TN
Athena Realty, Inc.	NV
Commco Cable Communications Company	TX
COMSEC Corporation	TX
Halifax Cable TV, Inc.	FL
Halifax Cablevision, Inc.	FL
Volusia Cable-Vision Corporation	FL
International Telemeter Corporation	NY
Knox Cable T.V., Inc.	TN
Tennessee-Kentucky Cable TV Company	TN
Texcom, Inc.	TX
Athena Development Corporation	DE
Athena Cablevision Corporation of Knoxville	TN
Schenectady Cablevision, Inc.	NY
Gibson Cable Television, Inc.	IN
Horizon Communications Corporation of Metro-East	IL
Horizon Communications Corporation of Southern Illinois	IL
Horizon Communications Leasing Corporation	KY
TCI HOLDINGS, INC.	CO
Cabletime, Inc.	CO
G.T. Cablevision, Inc.	NV

Name	State
All Channel T.V., Inc.	WI
Complete Channel T.V., Inc.	WI
Cablevision of Jefferson County, Inc.	MO
G.T. Cablevision, Inc. of North Carolina	NC
St. Louis Tele-Communications, Inc.	MO
STL Cablevision Partners	MO
TCI of Maryland, Inc.	MD
TCID of Cablevision, Inc.	NV
Illinois Community Cablevision, Inc.	IL
Tele-Communications of South Suburbia, Inc.	IL
TCI Cablevision of Michigan, Inc.	MI
TCI Central, Inc.	DE
TCI Cablevision of Colorado, Inc.	CO
TCI Cablevision of Oklahoma, Inc.	OK
TCI of Arkansas, Inc.	AR
TCI of Kansas, Inc.	KS
TCI of Louisiana, Inc.	LA
TCI Development Corporation	CO
Buffalo Tele-Communications, Inc.	DE
TCI of Buffalo, Inc.	NY
Cable Security, Inc.	NY
Cable Management Company	DE
Cable Network Television, Inc.	NV
Cable Television of Gary, Inc.	IN
Cablevision Associates of Gary Joint Venture	IN
CATV of Elizabeth, Inc.	NJ
Cable TV Company Ltd.	GA
Scriptel, Inc.	CO
Chesapeake Communications Cablevision Associates	MD
Columbia Satellite System	TX
Community Tele-Communications of South Dakota, Inc.	CO
Sioux Falls Cable Television	SD

Name	State
Country Cable Co.	CO
TKR Cable Company	CO
Enefen Corp.	DE
Hillcrest Cablevision Company	OH
LaSalle Telecommunications, Inc.	IL
Liberty Investments, Inc.	DE
Liberty—CSI, Inc.	CO
Communications Services Inc.	KS
Liberty Florida, Inc.	DE
Orcable Ltd.	OR
Liberty Michigan, Inc.	DE
Greater Media Cablevision of Western Oakland County Limited Partnership	MI
Liberty of Northern Indiana, Inc.	DE
U.S. Cable of Northern Indiana Limited Partnership	IN
Marcus Communications, Inc.	DE
Marcus Communications, Inc.	NV
GWC 73, Inc.	DE
GWC 106, Inc.	DE
Marcus Communications, Inc.	MN
Memphis CATV, Inc.	TN
Miami Tele-Communications, Inc.	FL
Miami Cablevision	FL
Motor City Communications, Inc.	MI
TCID Cable Management of Detroit, Inc.	MI
Pittsburgh Tele-Communications, Inc.	PA
Mahoning Valley Cablevision, Inc.	OH
TCI Cable Theatre, Inc.	NE
TCI of D.C., Inc.	DC
District Cablevision	DC
TCI Development Programs, Inc.	NV
TCI Information Services, Inc.	NV
X*PRESS Information Services	CO
TCI Productions, Inc.	NV

Name	State
TCI Sports, Inc.	NV
TCID Network of Delaware, Inc.	DE
TCID Networks of Minnesota, Inc.	MN
Cable Value Network	MN
TCID of Arizona, Inc.	AZ
TCID of Buffalo, Inc.	NY
TCID of Carson, Inc.	CA
Carson Cable Television Company Joint Venture	CA
TCID of Chesapeake, Inc.	VA
TCID of Chicago, Inc.	IL
Communications & Cable of Chicago, Inc.	IL
TCID of Denver, Inc.	NV
TCID of Florida, Inc.	FL
Gulfstream Cablevision of Pasco County	FL
TCID of Greenwich, Inc.	CO
TCID of Michigan, Inc.	NV
Bresnan Communications Company	MI
TCID of Missouri, Inc.	MO
Kansas City Cable Partners	CO
TCID of Montana, Inc.	MT
Vigilante Satellite Services	SD
TCID of Paterson, Inc.	NV
US Cable of Paterson	NJ
TCID of Puerto Rico, Inc.	NV
TCID of South Chicago, Inc.	IL
South Chicago Cable, Inc.	IL
Tele-Communications Cable Company	CO
TCI-Taft Cablevision Associates	CO
American Microwave & Communications, Inc.	MI
Four Flags Cable TV	MI
Four Flags Cablevision	MI
Muskegon Cable TV Co	MI

Name	State
Robert Fulk, Ltd.	DE
Four Flags Cable TV	
Four Flags Cablevision	
Muskegon Cable TV Co	
Waltham Tele-Communications	MA
Waltham Tele-Communications Inc.	CO
Taft-TCI Programs	OH
Tele-Communications Dominicana, Inc.	DE
Tele-Communications Investments, Inc.	CO
Cable T.V. of Minot, Inc.	ND
Communications Investments, Inc.	CO
Glendive Cable T.V.	MT
Silver Spur Land and Cattle Co.	WY
Bob Magness, Inc.	WY
Upper Valley Telecable Company, Inc.	ID
Tele-Communications Puerto Rico, Inc.	DE
Tele-Mont Communications Cablevision Associates	MD
Telenois, Inc.	IL
Cablenet Associates	IL
Vigilante Satellite Services	SD
Western Satellite, Inc.	NV
Airway Heights Cable Television, Inc.	WA
Davenport Cable Television, Inc.	WA
Deer Park Cable Television, Inc.	WA
Wilbur Cable Television, Inc.	WA
Western Satellite 2, Inc.	CO
TCI Sports	UT
Western TCID, Inc.	OR
West Suburban Tele-Communications, Inc.	MA
TCI East, Inc.	DE
TCI Cablevision of Massachusetts, Inc.	MA

Name	State
TCI Cablevision of New Hampshire, Inc.	NH
TCI Cablevision of Vermont, Inc.	VT
TCI of Delaware, Inc.	DE
TCI of Maine, Inc.	ME
TCI of Rhode Island, Inc.	RI
TCI of Virginia, Inc.	VA
TCI Growth, Inc.	NV
Alda Communications Corporation of Pennsylvania	PA
Southeastern Cablevision Company..	PA
Brookside Antenna Company	OH
Cable Delaware Ltd.	DE
Cable Finance Corporation	DE
Cable Information Services, Inc.	DE
Alpena Cablevision, Inc.	MI
Hobbs Cablevision, Inc.	NM
Jal CATV Corporation	NM
Logan Cablevision, Inc.	WV
L-B Cablevision, Inc.	WV
Marion Cablevision, Inc.	DE
Carbondale Cablevision, Inc.	IL
Cable Information Systems of Brunswick, Inc.	OH
Cable Investments, Inc.	DE
Brazoria Cablevision, Inc.	TX
Brazoria Cablevision Associates	TX
Standard Communications Associates, Inc.	DE
G-F Cable T.V., Inc.	ND
Madison Communications, Inc.	DE
Island Cable Company	NJ
Madison Cablevision, Inc.	DE
St. Albans Cablevision, Inc.	DE
Video Design Cable Televison	FL

Name	State
Central CATV, Inc.	IN
Plains-Indiana, Inc.	DE
Clearview Cable TV	
Total Cable TV of Delphi, Inc.	IN
Total Cable TV of Fowler, Inc.	IN
Total Communications Cable Company, Inc.	IN
Crest Communications, Inc.	KS
Newton Cable TV, Inc.	KS
Satellite Communications Services, Inc.	KS
Green Country Cable of Haskell, Incorporated	OK
H.C. Ostertag Cable Television Co., Inc.	PA
Joseph S. Gans, Inc.	PA
Micro-relay, Inc.	DE
Missouri State Cable, Inc.	MO
Muskingum County Cable Television, Inc.	OH
Orangetown Cablevision, Inc.	NY
PCNH, Inc.	DE
Rockland Information Systems, Inc.	NY
Good-Vue CATV, Inc.	NY
Salem Cablevision, Inc.	IN
Schiavone Communications of Pennsylvania, Inc.	PA
Southeastern Cablevision Company	PA
SEE TV Co.	MO
Susquehanna CATV, Inc.	PA
West Shore TV Cable Co.	PA
TCI Cablevision of Georgia, Inc.	GA
GWC 54, Inc.	DE
GWC 91, Inc.	DE
GWC 95, Inc.	DE
GWC 100, Inc.	DE
TCI Cablevision of Minnesota, Inc.	MN
GWC 7, Inc.	DE

Name	State
GWC 18, Inc.	DE
TCI Cablevision of New Mexico, Inc.	NM
GWC 24, Inc.	DE
TCI Cablevision of Texas, Inc.	TX
GWC 29, Inc.	DE
Southwest Video Corporation	TX
TCI Cablevision of Wisconsin, Inc.	WI
TCI Cablevision of Wyoming, Inc.	WY
TCI Growth, Inc.	CO
TCI of Illinois, Inc.	IL
GWC 74, Inc.	DE
TCID of Suburban Chicago, Inc.	IL
Lakes Cablevision, Inc.	DE
Nico Cable, Inc.	IL
TCI of Iowa, Inc.	IA
TCI of New Jersey, Inc.	NV
GWC 69, Inc.	DE
GWC 102, Inc.	DE
GWC 105, Inc.	DE
TCI of New York, Inc.	NY
GWC 69, Inc.	DE
GWC 102, Inc.	DE
TCI of North Dakota, Inc.	ND
TCI of South Carolina, Inc.	SC
GWC 34, Inc.	DE
TCID of Texas, Inc.	TX
Tele-Ception of Winchester, Inc.	KY
Trans-Muskingum, Incorporated	WV
Ulster County CATV, Inc.	NY
Kingston CATV, Inc.	RI
Kingston Cablevision, Inc.	NY
Video Design Cable Television	FL
Wayne County CATV, Inc.	IN
Clearview Cable TV	
TCI Holdings II, Inc.	CO
Group W Cable, Inc.	NY

Name	State
TCI North Central, Inc.	DE
TCI Cablevision of Nebraska, Inc.	NE
TCI Cablevision of South Dakota, Inc.	SD
TCI Northeast, Inc.	DE
TCI Cablevision of Ohio, Inc.	OH
TCI of Pennsylvania, Inc.	PA
TCI of West Virginia, Inc.	WV
TCI Southeast, Inc.	DE
TCI Cablevision of Alabama, Inc.	AL
TCI Cablevision of Florida, Inc.	FL
TCI Cablevision of Kentucky, Inc.	KY
TCI Cablevision of North Carolina, Inc.	NC
TCI of Indiana, Inc.	IN
TCI of Mississippi, Inc.	MS
TCI of Tennessee, Inc.	TN
TCI West, Inc.	DE
Liberty Communications, Inc.	OR
GWC 23, Inc.	DE
Billings Tele-Communications, Inc.	OR
Liberty Television, Inc.	OR
Liberty Broadcasting, Inc.	OR
Nation Wide Cablevision, Inc.	DE
Nation Wide Cabevision, Inc.	CA
Peninsula Cable Television Corporation of Menlo Park	CA
GWC Microwave, Inc.	DE
TCI Cablevision of Arizona, Inc.	AZ
TCI Cablevision of California, Inc.	CA
GWC 93, Inc.	DE
Peninsula TV Power, Inc.	CA
Peninsula Cable Television Corporation of San Mateo	CA
Sierra Communications Systems, Inc.	CA
TCI Pacifica Corp.	DE
Brisbane Cable TV, Inc.	CA

Name	State
Crystal-Brite Television, Inc	CA
Fremont Cable T.V., Inc.	CA
Vista Grande Cablevision, Inc. .	CA
TCI Cablevision of Montana, Inc.	MT
GWC 33, Inc.	DE
GWC 44, Inc.	DE
GWC 55, Inc.	DE
TCI Cablevision of Utah, Inc.	UT
Community Television of Utah, Inc.	NV
Ruti-Sweetwater, Inc.	DE
Davis County Cablevision, Inc.	UT
Wasatch Community T.V., Incorporated	UT
Utah Satellite Company.....	DE
TCI Cablevision of Washington, Inc.	WA
GWC 47, Inc.	DE
GWC 92, Inc.	DE
GWC 103, Inc.	DE
GWC Auburn, Inc.	DE
GWC Seattle, Inc.	DE
TCI of Idaho, Inc.	ID
GWC 47, Inc.	DE
GWC 66, Inc.	DE
TCI of Nevada, Inc.	NV
GWC 93, Inc.	DE
GWC 72, Inc.	DE
Wells TV, Inc.	NV
TCI of Oregon, Inc.	OR
TV Pix, Inc.	NV
TCI UA, Inc.	DE
United Artists Communications, Inc.	MD
Black Entertainment Television, Inc.	DC
Cable Education Network, Inc.	MD
Cencom Cable of Associates, Inc.	DE
Cencom of Kentucky	KY

Name	State
Concom of Missouri I	MO
Concom of Missouri II	MO
Cencom of Missouri III	MO
Cencom of North Carolina	NC
Cencom of South Carolina	SC
Columbia Associates L.P.	DE
C.O.M.B. Co.	MN
C.O.M.B. T.V. Co.	MN
Cable Value Network	MN
Daniels & Associates Partners Limited	CO
Mile Hi Cablevision Associates, Ltd.	CO
Gulfstream Cablevision of Pinellas County, Inc.	FL
Lenfest Communications, Inc.	DE
Lebananon Valley Cable TV Co., Inc.	PA
Suburban Communications, Inc.	PA
Suburban Pottstown Cable TV Co.	PA
Big Sky Community TV, Inc.	MT
Metro Cable Corporation	CO
Mont-Sat Cable, Inc.	MT
Skyview TV, Inc.	MT
Village Cable, Inc.	SD
Western Community TV, Inc.	MT
WSS Cable TV, Inc.	MT
Portel Services Network Limited Pt.	CT
Taft-TCI Satellite Services, Inc.	CO
Tablecable Nacional, CXA	DE
Telecrafter Corporation	DE
Data Cable Corporation	DE
X*PRESS Information Services	CO
Telecrafter Services Corporation	DE
Tele-Matrix	NV
Televents Group, Inc.	NV
Turner Broadcasting System, Inc.	GA
United Cable Television Corporation	DE